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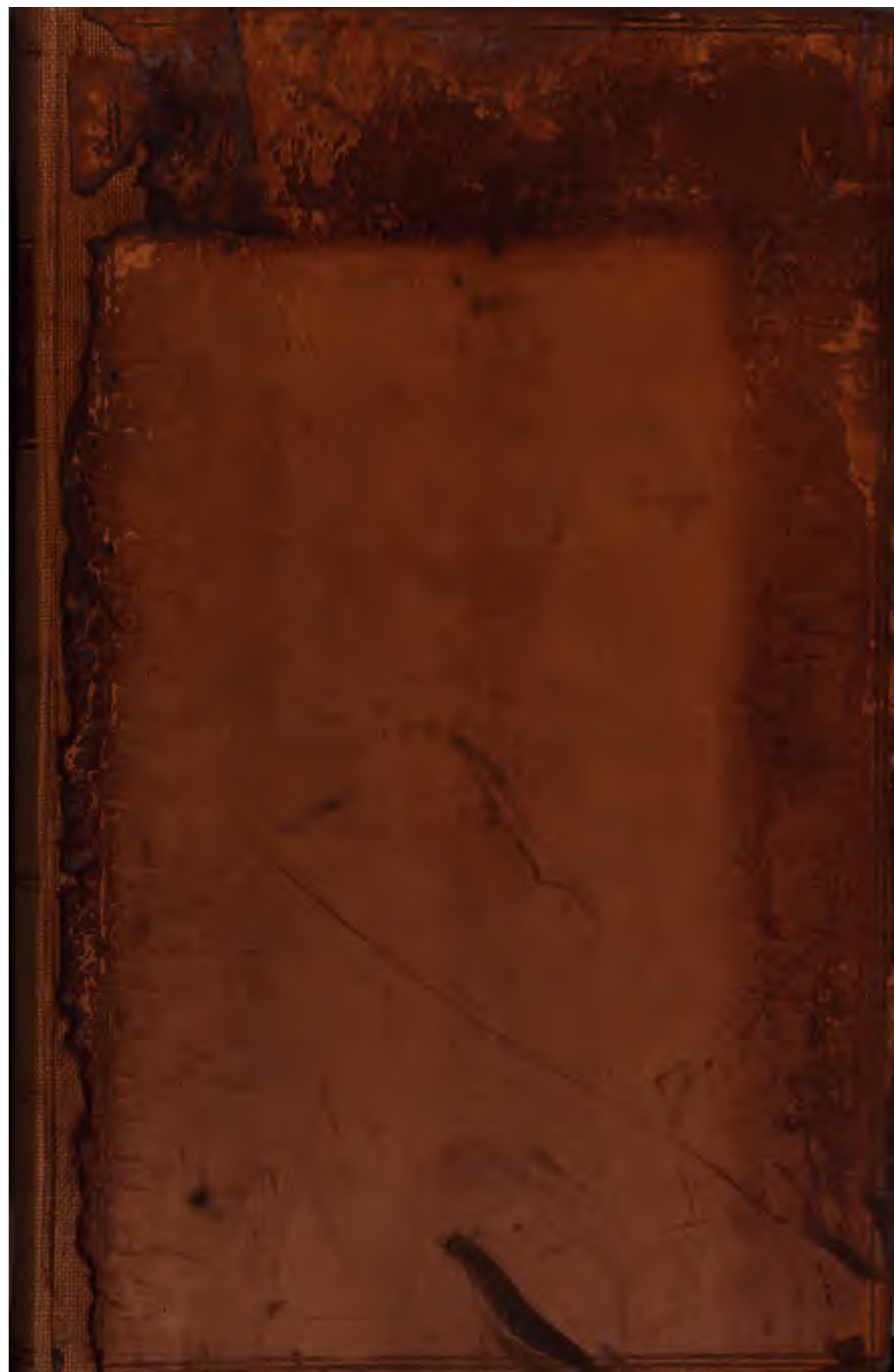
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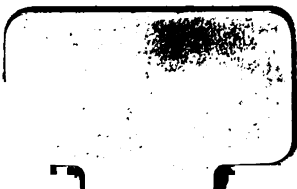
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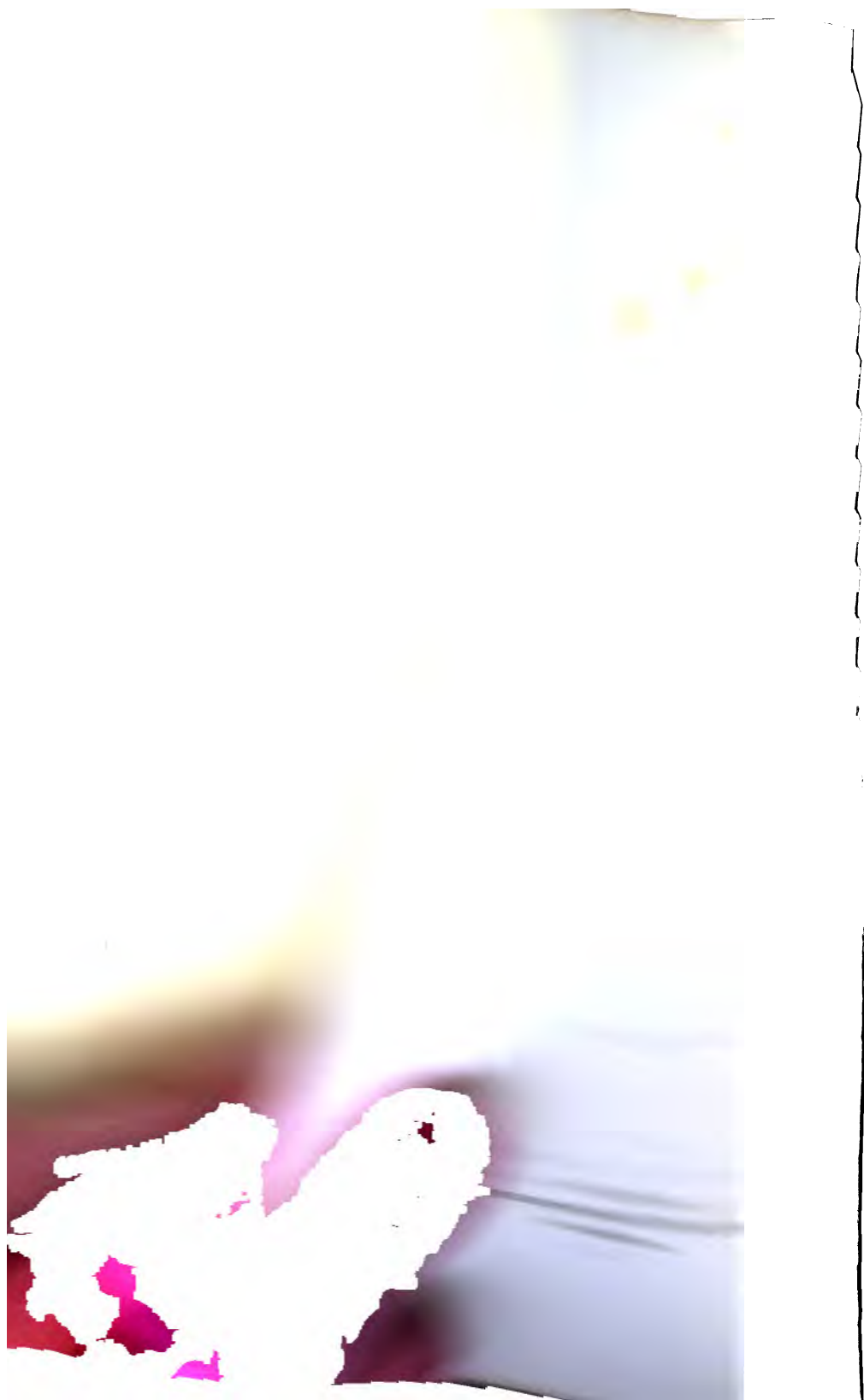
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A
TREATISE
UPON THE
LAW OF ANNUITIES
AND
RENT CHARGES.



BY
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LONDON:
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43, FLEET STREET.
1833.



TO
THE HONOURABLE
[H] SIR JAMES PARKE, KNT.
OF THE JUDGES OF HIS MAJESTY'S COURT OF KING'S BENCH,
The following Treatise
IS
DEDICATED,
IN TESTIMONY OF THE AUTHOR'S RESPECT
FOR THOSE EMINENT QUALITIES OF DECISION, VIGOUR,
AND INDEPENDENCE,
ATTEMPERED WITH THE MOST COURTEOUS URBANITY,
AND FOR THAT ACCURATE AND COMPREHENSIVE KNOWLEDGE,
AS WELL OF THE GENERAL PRINCIPLES
AS OF THE MINUTE AND PRACTICAL DETAILS
OF ENGLISH LAW,
WHICH HAVE ALREADY INSURED TO HIM A PLACE AMONG
THE ABLEST JUDGES OF THIS COUNTRY.

INTRODUCTORY ESSAY.

BEFORE entering upon the discussion of the law, as applied to the very important contracts which are the subject of the following treatise, there are some few historical details which may be properly laid before the reader ; and there are some general observations arising from a consideration of these contracts, and the regulations that have been imposed upon them, which the Author wishes to express. He feels that though a criticism upon the law is out of place in the body of a treatise which professes to detail what the law is, yet it may not be deemed improper in the preliminary remarks which custom authorizes him in prefixing. With that feeling he has thought it right to state his opinion upon the general merits of annuities, and the laws which directly or indirectly affect them, but as briefly as he has been able, remembering that his principal object has been, a compilation of the Law of Annuities, and not a criticism upon it.

To refer, in the first place, to the historical details : it seems singular, that, although the an-

cient Romans carried the system of money-lending to an unlimited extent, and adopted a variety of modes to evade the laws, which prohibited, with great strictness and severity, excessive usury, the method of lending money by means of annuities does not appear to have prevailed among them. At least no trace remains to modern times to show that they were acquainted with this contract, except, indeed, what may be gathered from a case which occurs in the 160th Novel of Justinian. It is there recited, that the magistrates of the city of Aphrodisium had advanced to particular individuals certain sums of money, the property of that city, of which they were to have the custody, and for which they were to pay to the city a reasonable recompense. Upon this agreement, it is said, a doubt arose whether a rent or a payment of interest was constituted. The parties who had received the money availed themselves of a decree of the emperor, whereby he had enacted that no interest should be paid on loans after the principal had been repaid by the interest, and refused to pay this rent or interest. On complaint to the emperor, he declared that his former decree did not apply to such a case as this, since it referred to the lenders of money, whereas the present was more like an annual rent than payment of interest (*magis annuo redditui quam usurarum prestationi simile videtur*). This certainly seems to have been some contract not altogether unlike our annuities, though it is

by no means clear whether the principal money advanced was to be returned or not, which, as will appear hereafter, is the main distinction between a loan of money and the sale of an annuity. The civilian Du Moulin (*a*), having examined this case at length, determined that it corresponds with the French contract of a *rente constituée*, and Pothier (*b*) also seems to assent to this opinion; there is, therefore, some ground for the inference that this contract was not altogether unknown at the very latest period of the Roman law.

As to legacies of annuities it will be found that among the valuable remains of Roman law relating to legacies, these have not been omitted. There is a title in the Digest (*c*) which treats *De Annuiis Legatis*, and contains a variety of decisions which may on occasion be of service to the English lawyer when called upon to explain bequests of this kind of property.

In the law of England a distinction has ever prevailed between the real and personal estate, between land and other property, and there is often a corresponding division among contracts, the same in substance and effect, but differing in their security. Of this the subjects of this treatise exhibit a remarkable instance, for the annuity was

(*a*) Molinæus de Usuris, q. 75.

(*b*) Traité du Rente Constituée.

(*c*) Lib. 33. tit. 1.

in early times a contract binding upon the person of the grantor, while a rent was a charge upon the land. The mode in which the law has regarded charges upon these different funds has operated in a similar manner in respect of those contracts. It is impossible to say when either the one or the other was first introduced into England. As early as the reign of Edward I. the writ for the recovery of an *Annuus Reditus*, however charged, is recognised as an existing common law remedy—a satisfactory proof that the contract was then well understood.^(a) In the succeeding reigns various cases are reported as having been brought before the courts for judicial determination, so as to establish clearly that it was in considerable practice. From those cases it is perceptible that this practice was divided into two classes—the granting of rents, and the granting of annuities.

The lord of the fee, by his tenure, had not the power, as probably he had not the inclination, to alienate his land from his heir, yet he would often have other children or relatives for whom he might wish to provide after his death. To them he granted a rent charged upon the land, which descended upon the heir, and gave a power to the grantee to enforce it. If that power were a power of distress, the grant was properly a rent charge; if he merely directed that the rent should issue

(a) Fleta, 136.

out of the land without giving that power, the rent was termed a rent seck, and the grantee could only have a remedy by action for the recovery of it, if it were not paid.^(a) It is obvious that the creation of such charges would necessarily diminish the produce of the land in the hands of the landowner, and render him less able to perform his services to his superior lord. Hence in the early authorities rent charges are stated to be against common right, and the interpretation of the courts was always guided by that bias. In modern days, however, when the feudal services have ceased to exist, or be recognized, no such bias prevails, but rent charges are looked upon as favourably as any other species of contract.

Annuities, in their early introduction, were most frequently adopted as a mode by which the services of professional men were retained. When the population was low, and enclosed in small towns at great distance from each other, and while the communication was difficult and dangerous, there could be but little inducement for the studious man to apply himself to the acquirement of knowledge in those professional departments which now produce ample recompense to the skilful and the prudent; or, if there were any such persons, it was to be expected that they would be confined to the towns and cities, where they could alone hope for security and practice. In order, therefore,

(a) Cruise Dig. tit. 28. c. 3. s. 13.

that the great lords and barons, who lived in their separate castles, might not be left destitute in their necessities of all whose services and assistance would be of value on emergencies of danger, they were compelled to adopt, as a mode of retainer, the granting of annuities to competent persons for the advice which they should render whenever any occasion might arise to require it. Thus the chaplain, the lawyer, and the physician, had their annuities *pro consilio impendendo*, as was the phrase in the old law. Sometimes, as may be supposed, the annuity was granted in compensation of advice or service already given or rendered, without any view to future retainer, it was then said to be *pro consilio impenso*. This has been preserved to the present day most remarkably by the government in the pensions, which have been, and still continue to be, given as a recompense for public services already performed. Some few of the ancient annuities *pro consilio impendendo* still survive, as in the instance of the king's physicians, who have a regular stipend, and are bound to give their advice to the king whenever required. These annuities differ from salaries paid to servants and officers in this respect, that in the former the grantees are only occasionally called upon, or it may be never, whereas the latter are always on duty, and when that duty ceases, the salary determines. This is shown in the instance of Sir Thomas Wroth, whose case is reported in Plow-

den's Commentaries. He was appointed by King Henry VIII. gentleman usher to his son, afterwards Edward VI., with an annuity for life. It was held, that though his duties ended with the death of Henry, because the new king could not have such an officer, yet the annuity granted to Sir Thomas Wroth continued during his life.

Besides these, among other abuses of the Roman Church, in the desire to appropriate to the dignitaries all the temporal emoluments of the ecclesiastical possessions, the pontiffs introduced a practice of reserving to themselves certain pensions, as they were called, out of the temporalities of the churches that they were sometimes enabled to dispose of. These charges became frequently so extensive, that, as Giannone(*a*) expresses it, they were as valuable as the benefices themselves. The custom, once introduced, easily extended itself to other grades, and bishops and the rich monasteries and priories reckoned among their endowments many valuable grants of pensions, which the secular clergy were compelled to pay out of the revenues of the parish church. It is evident that this was most injurious to the true interest of the church, but there was no complaint;—the patron of the living, where it was in lay hands, which was unusual, generally assented to the charge, because his chaplain, or relative, was a member of the religious corporation, for whose

(*a*) Istor. di Nap. lib. 22, c. 5.

benefit the charge was created; while the bishop did not object to what was a common practice, from which he himself, in other instances, derived a personal advantage. Hence, at the Reformation, there is reason to believe that the number of pensions charged upon ecclesiastical benefices was very considerable; but owing to the great change which then took place in the property of the church, the greater part of them were lost, and the charges discontinued. Where they did survive that event, they have been usually such small sums as in the process of time, when property was so much increased in value, have scarcely recompensed the trouble of collection; they did not, like the quit rents and small fines of a manor, constitute the evidence of any other right, and therefore did not create any extrinsic interest in their preservation. Accordingly, although church pensions may not be altogether extinct, yet they are very uncommon, and very rarely raise any legal discussion.

But rents and annuities have become far more frequent as a mode by which money may be borrowed, so as to compensate the lender beyond the ordinary rate of interest upon the loan of money. By the general law of Europe prevailing almost universally where the canon law was in force, the taking of interest at all upon the loan of money was prohibited as usury. Necessity compelled the violation, or at least the evasion of that law. Accord-

ingly the mode of granting rents was introduced to enable the possessors of money to obtain that which is most reasonable, a fair recompense for the loan. It is probable that the instance above referred to from the novel of Justinian might have been one among many examples, the remembrance and the practice of which continued during the dark ages. About the middle of the fifteenth century the practice seems to have been extensive, and called forth the attention of lawyers. It seems that the party who was in the possession of money agreed with the party who wished to borrow to give him such money upon having a certain sum paid annually, with a power for the borrower, on repayment of the same sum, to put an end to the annual payments; and, by way of security for the annual payment, the party receiving charged all his property, as well real as personal. It seems impossible not to see that in effect this was a loan of money at interest. Accordingly the legality of these contracts was disputed, and the question was carried before the pope himself. Pope Martinus V., in the year 1423, was consulted by the clergy, nobles, and inhabitants of Bohemia, as to this subject. They stated that a custom had prevailed in that country above a century, and indeed immemorially, to buy and sell such rents at such rates as the parties could agree upon; that they were redeemable at the option of the seller, and had been frequently enforced, but that doubts had now

been raised as to their legality. That pope examined the question, and doubtless guided by the more enlightened views which began to prevail regarding commercial matters, decreed that such contracts were perfectly lawful. Afterwards, in 1455, the same question was submitted to a succeeding pope, Calixtus III., from Westphalia, where the custom is alleged to have prevailed immemorially, and that pope confirmed the decree of his predecessor. Both decrees have been preserved in the *Corp. Jur. Canon. Extra. III. tit. 5*, and have been considered as having determined the question.^(a) The doubts of spiritual consciences being thus settled, no difficulty arose in any other quarter, but certain regulations were made on the part of some of the temporal princes of the continent with reference to this contract. In France, the rent was termed a Rente Constituée, and originally it seems that not only money was payable, but also corn and other similar articles were rendered. This was prohibited, and the payments were confined to money. Again: the rate of recompense, for it is difficult to treat it as the rate of interest, was fixed by various edicts at different points, as in this country the rate of interest upon loans has been differently fixed by the statutes against usury. However, by the Code Napoleon, Art. 1976, it is enacted, that the rente may be granted at any rate on which it may please

(a) Pothier, Sur la Rente Constituée.

the contracting parties to fix. And in England a rent was never treated as a loan of money, and therefore was not subject to the laws respecting usury, but the parties have been allowed to make such terms as they may choose to agree upon. Although it be not necessary to examine the foreign law upon the whole of this subject, yet it is right to mention that in France a rent may be granted in perpetuity, or for a definite term, and then it is termed a *Rente Constitué*, or it may depend upon the existence of a life, and then it is termed a *Rente Viagère*.

These rents having been established as lawful, the commercial states of Italy first introduced the remarkable invention which distinguishes modern history, namely, the establishment of a public national debt, for which the whole state is responsible. The states of Venice and Florence during their necessities in the fourteenth century raised compulsory loans from their citizens, who were required to deposit for the public use certain sums of money, which they could never recall, for which, however, the state guaranteed to pay a certain annual rent, and retained an option of redeeming the capital advanced at any future time. Other governments adopted this same practice, and borrowed money from their citizens on the same terms. In England, as is well known, Charles II. deeply indebted, prevailed upon his creditors to cancel their debts, and to take his bonds, whereby

he bound himself to pay them annuities, pledging as security certain hereditary revenues of the crown. In the reigns of William III. and his successors till the present, money has been borrowed at various times to an enormous extent, for which the lenders have received annuities, to continue until the lapse of a definite length of years, or until the state shall redeem its debt, according to the terms of the original loan. Different portions of this debt have different names, the whole capital is generally known by the name of Stock, or the Public Funds, while particular portions are entitled Annuities. On the continent the public debt of several nations is denominated Rentes.

This is not the proper place to enlarge upon the various matters concerning the public funds, which such a subject would necessarily embrace, nor do they fall within the scope of the following treatise. But it may be noticed, that as part of the debt consists of annuities, which were originally granted for a definite period, and are now running on, so it has been attempted to redeem a portion of the perpetual debt, by granting to the holders of stock, who may choose it, annuities for life, or for terms of years, at rates which have been the subject of calculation, and under such regulations as the legislature has found most beneficial. These regulations are now contained in an act of parliament passed in the latter end of the late reign, 10 Geo. IV. c. 24, since amended by the 2 Will. IV. c. 59.

To revert to private contracts, rents continued to be granted as a convenient form of family arrangements, and as such are still in force. Where it is desired to keep up a mere temporary charge, for the use and interest of individuals, these forms are exceedingly convenient. Thus, a rent charge will be a more equitable and more beneficial interest to a widow than her dower; while a weak, imbecile, or imprudent child may be best provided for by a life rent charged upon the estate. The interest of joint-tenants or tenants in common may be more easily parted, and those of an heir satisfied by the compensation effected through the means of these grants, and a variety of instances occur where they will be highly advantageous.

It does not appear that rents and annuities were resorted to by money lenders in England so early, or so generally, as on the continent. It may have been, partly because the commercial necessities of England were not so far advanced as those in Germany and Italy, and partly because the lending on interest, which was wholly prohibited abroad, was legalised in this country so early as the reign of Henry VIII. In the latter end of Elizabeth's reign, and the beginning of James I., a few cases occur where this contract was adopted as a mode of borrowing and lending money. And during the stormy and distracted period of the seventeenth century, the

contract gradually became more frequent for this object. Annuities ceased to be granted for the purposes of retainer as anciently, since the altered state of the population and the condition of the country rendered that course unnecessary; but they came more into use by way of bequests and voluntary gifts, and became more valuable as personal property itself, on which they were secured, ripened into greater stability.

As the practice of this mode of borrowing money thus progressively increased, the doubts which formerly arose on spiritual grounds were again excited with reference to the legal provisions of this country. While it was admitted that the contract of purchase and sale was perfectly untouched by the statutes against usury, it was contended that contracts substantially loans, not only in the effect, but in the intent of the parties, came clearly within the prohibitions thereby imposed. Although, therefore, a rent might be, as any other property, the object of a purchase and sale, yet if it were manifest from the contract that the parties only used it as a form to disguise a loan, and the clause which permitted its redemption was a striking proof of this, it was urged that it could not be exempted from the operation of the statutes. The struggle lasted for many years. Various opinions were given by different judges, especially by Lord Nottingham and Lord Hardwicke, in disapprobation of the practice. They

perceived the evils necessarily attending upon all acts which are evasions of the law, and which the unsettled state of this question rendered still greater, but they found themselves unable to decide that annuities and rents were in themselves illegal. It was attempted to evade the supposed illegality by using the terms purchase and sale, and repurchase, throughout the deeds; but, of course, the use of such terms would be of little avail if the effect of the contract were different. Then, as the clause of redemption was alleged to constitute a mark of illegality, this was omitted in the deed, although there was a secret understanding that the grantor might redeem on terms then agreed upon. At length, about the middle of the last century, all doubts passed away, and annuities, which became more frequent, were generally acknowledged to be legal, although accompanied with a power of redémption.

Needy and distressed men, whether their distresses arise from misfortune or imprudence, have always found it a hard and painful task to raise money to relieve them from temporary embarrassment. Concealment is generally their own desire, and gives opportunity to fraud and imposition; while their own distress, showing the insecurity of the loan, compels the lender of money to demand a higher rate of interest in compensation of the risk he incurs. These are evils which necessarily accompany these transactions. It was a mistaken

policy in the legislature to restrict the terms upon which money should be lent, and a still worse to place the limit at that rate at which the man in good credit can openly borrow. Is it to be supposed that what is a fair compensation where there is no risk can be sufficient where there is great probability of loss? Experience has plainly proved that this policy was mistaken, although our early legislators deserve great credit for breaking through the erroneous prejudice which prohibited all interest whatever. The consequences of the law, however, have been severe upon the borrowers: the former secret transaction has been involved in greater obscurity, and fraud has still more extensively prevailed.

While it was uncertain whether annuities were legal or not, they were nevertheless in common practice, though in most cases transacted secretly, and the deeds and instruments were made to represent a false contract, lest hereafter the whole transaction should be set aside. There is no reason to believe that more devices of fraud, imposition, or oppression attended this contract than any other mode by which the usury laws were evaded. But it is beyond doubt that disclosures of great iniquities and great oppressions were made, and a very powerful writer, no less a person than the late Lord Erskine, in the early commencement of his career, brought the subject before the attention of the public, in a highly

wrought and eloquent pamphlet, in which he prayed for the interposition of parliament. That call was reiterated on other sides, and the legislature was at length excited to consider the subject. (a) In 1777 a bill was introduced into the House of Commons by the Solicitor-General to restrain the granting of annuities for the life of the grantor, and passed that house; in the Lords, however, it was materially altered, so as not to prevent the granting of life annuities, but to allow the same to be considered as a security for the money actually advanced and interest, and a power was given to the courts to inquire into the fairness and propriety of the transaction, and to make such orders as in their discretion might be proper. The bill, however, when returned to the Commons with these amendments was there abandoned; but a committee was appointed to take into consideration the Usury Laws and the practice of purchasing life annuities, and to report their opinion. This committee entered seriously upon the inquiry, and made an elaborate Report, which will be found printed in the Journals of the House of Commons. They concluded their report by several resolutions, in which they resolved that these sales of life annuities were generally intended to be loans, and ought to be regulated as such; and they farther resolved upon certain estimated rates at which annuities ought to be

(a) 36 Comm. Journ. 208, 229, 254, 320.

purchased, and proposed that these should be fixed by an act prohibiting higher rates. A bill was brought in agreeably with these resolutions, was read and committed, after which, however, it was dropped. When the House of Lords had returned the amended bill to the Commons, who refused to agree to the amendments, the Solicitor-General, Wedderburne, afterwards Lord Loughborough and Earl of Rosslyn, prepared a bill for registering the grants of life annuities and protecting minors, which he presented to the House in the same session. It had more success than the others, as it appears to have been that which the ministers supported, and having passed both Houses became the first annuity act, 17 Geo. III. c. 26. The provisions of this act will be a matter of considerable attention in the following treatise, and need not be here detailed. One of the most serious complaints against the contract arose from the secrecy of the transaction, and from the fact of the real parties being kept out of view. It was proposed to remedy this at least, by requiring that a memorial should be publicly enrolled, setting forth the whole particulars of the transaction, and the names of the parties really interested therein, under a penalty of the invalidation of the contract. This was evidently a very different measure from what had been contemplated, and was only intended to be auxiliary to the proposed alteration. It is a subject for congratulation, how-

ever, that the other measure did not pass, the interference with private contracts has ever been unsuccessful, and no doubt this would not have been an exception to the general rule. But it may be questioned whether the provisions of the act which was passed have been so beneficial as was hoped, or, indeed, whether the regulations were altogether proper. In the first place, a great expense was added to those which necessarily attended the transaction, and of course fell upon the borrower, while the object of the act was not that which the registration of other title-deeds assumes, namely, the security of subsequent purchasers, but was solely confined to the seller's benefit, in order that the circumstances attending the grant might be open to him and to those who represent him. It is manifest that this provision could not compel the parties to state those circumstances truly. If they mutually agreed to do otherwise, all that was requisite was that the memorial should correspond with the deeds, and these would be externally fair and proper. It was no advantage to the borrower to suffer the urgency of his distress to appear in a public document, and he willingly allowed the whole to appear most honourable. There was a risk to the lender of the grantor's afterwards disclosing the true state of the case, and procuring the deeds to be set aside and the grant vacated; but there were many accidents which might prevent this, there was the grantor's

honourable feeling to rely upon, and there was the compensation which this risk enabled him to exact. Again, the act of parliament was by no means explicit in its language, it became difficult to understand the directions contained in it, and cases of doubt came before the court until decisions evidently contrary to the intention of the legislature, if not contrary to the apparent meaning of the act, were accumulated, so as to render the memorial an instrument requiring extraordinary skill and knowledge for its production. Where any error occurred in this complicated instrument, it was fatal to the annuity; and hence an additional risk was thrown upon the grantee, for which of course he required an additional recompense. Besides, an inducement was held out to the grantor to act contrary to the strict line of honour and equity, by availing himself of an accidental error to disturb a just and equitable contract. For it is a curious fact, that among all the cases reported, where the annuity has been vacated for a defect in the memorial, there are very few, if indeed any, where the reader can say that in conscience or equity the grantee is chargeable with wrong. The memorial had become an instrument quite foreign from its original intent, and more mischief than benefit resulted from it. The legislature at length was called upon to correct that act, and the constructions put upon it, and accordingly, by the second

annuity act, passed in 1813, the 53 Geo. III. c. 141, a new provision was made; for, in lieu of the full memorial of the whole transaction, a mere index is required to be registered of the instruments, and the grantor has the power of compelling the grantee to give him a copy of those instruments. This is by no means so formidable a provision as that contained in the first act, but it is still questionable whether the expense incurred by it, and the risk to the grantee of failure in the registration, has any counterbalancing advantages. It very rarely happens that the grantor has not either a copy of the deeds themselves or an abstract thereof sufficient for all honourable purposes. This act gave very explicit tabular directions as it was thought, yet it has been necessary to pass two statutes to amend it, as will be shown in the body of the treatise.

But the really beneficial parts of the act were those which restrained young men from ratifying all contracts for annuities made by them when minors, and those which gave to the common law courts power to interfere summarily in cases where they could not previously, namely, where fraud had been practised, and the suffering party was not permitted by the common law to give his testimony, without which the transaction could seldom be disclosed. That power which the courts of equity possessed was conferred upon the courts of law with the most salutary effect,

The legislature has also attempted to limit the brokerage which shall be paid to the party negotiating the bargain, and has even gone the extreme length of declaring the taking any excess above that limit a misdemeanor; but there is reason to believe that this attempt has been unavailing, like all others where it is proposed to fix the price of contracts.

The attention of the legislature was confined to the relief of persons in distress, and, therefore, it has not interfered with any annuities where it is presumable that the grants do not proceed from pecuniary necessities. Where the security is ample, the grantor can always obtain reasonable terms; he is not obliged to resort to clandestine measures, and is not exposed to the fraud and extortion which was supposed too frequently to accompany other grants. Hence the acts only apply to annuities granted for a term of life; so that if the grant be for a fixed term of years or in perpetuity, it is not subject to the regulations of the statutes. There is also an express enumeration of a series of exceptions of grants which will also be examined in detail hereafter.

For many years after the passing of the first act it was considered so highly remedial and beneficial, that every interpretation was made to extend its provisions; but this view of the subject became at length changed, when it was seen that the effect of the statute was to destroy solemn instruments,

and oftentimes to divest interests, believed to be unimpeachable, after a long lapse of time. The courts, therefore, came round to the calm and more prudent course, and have considered that solemn contracts, fairly entered into, ought not to be too lightly vacated for mere formal defects and omissions.

It has been customary to decry this contract, and Mr. Plowden, with great earnestness and in most strenuous language, has inveighed strongly against life annuities. But this prejudice is wholly unfounded, and is only supported by the objections arising from its abuse. A man who raises money for the present moment, and charges his future property with the payment, is justified or not according to his object and purpose. If it be spent imprudently or extravagantly, his conduct is reprehensible, but if it relieve him from difficulty, the sacrifice of his future income may be attended with beneficial results as a punishment for past misconduct, or as the support of credit under temporary misfortunes. Again: why may not a parent raise a portion for a child by assenting to the diminution of a future income; or why may not money raised upon the security of a small estate be prudently expended in commercial speculations? No doubt there may be hazard in this, but that is to be expected in all transactions, and can hardly be treated as a serious objection. On the other hand, a person possessed of a sum of

money which produces a scanty interest, may often be well justified in sacrificing the capital to secure an increased income for life. He can, in truth, personally have but a life interest in that money, and may, therefore, fairly avail himself of the means, which this contract affords, of converting that life interest into a full enjoyment. In some cases indeed such conduct may be selfish and ungenerous, but in others it may be prudent or even necessary, and the affection of friends and relatives is of little value, who would complain when the bare scanty income is thus increased to competency, though the expected legacy may fail.

It is urged that this has ceased to be an aleatory contract, since the risk of the capital is not incurred, in consequence of the practice of insuring the annuitant's life at the sum advanced, so that when the annuity ceases, the price paid for it is returned. That is no doubt true, and in the common course the grantor is required to pay that insurance. Still this does not alter the nature of the contract. That insurance has always been charged by the grantee, his annual payment was calculated with reference to the risk of the grantor's death before the consideration advanced, and the due interest thereon, had been restored. If, therefore, it be a part of the contract that the grantor shall pay the insurance on the annuitant's life, the amount of the annual payment will be proportionably diminished, or the consideration

for the grant will be increased. The grantee may choose to be his own insurer, and not require that insurance to be kept up by the grantor in any public office, especially when he considers that in a public insurance, the assured pays not only the value of the risk, but also the heavy government duty. He will then diminish the amount of the consideration or increase that of the annual payment.

As to the objections arising from the frauds and extortions of money-lenders and annuity-brokers, no doubt a party may incautiously commit himself into the hands of persons who will extort every possible advantage from the urgency of his distress; but there is no necessity to resort to such persons; he will always find men of honourable character and respectable practice who will be able to attend to his interests, and to advise him fairly and prudently as to what will be his proper course, and who will obtain for him such assistance as in his situation he can reasonably expect. But he must not hope to find this a cheap expedient, for it is quite otherwise. The securing to the grantee the full completion of the contract is attended necessarily with expense. He lies at the mercy of the grantor, for he has parted with the price of the contract, and is only to have his return by periodical payments; he trusts to the due payment at proper intervals, and if that be not performed, he must be a sufferer. To prevent the failure he

is compelled to exact a complete security by a charge over all the grantor's property ; and it is evident that the creation of such a charge can only be perfected at a very considerable expense. The legislature has unintentionally increased that expense by what has been shown above ; and if the proposed alteration respecting registrations be carried into effect, still farther expenses will be thrown upon the grantor. In general these expenses are paid by him, though they do not necessarily form a charge upon him. In most contracts indeed the charges of the instruments are borne mutually by the parties, though in loans the borrower pays for the security. If the trade in money were as free and unrestricted as in other articles of commerce, no doubt the equitable arrangement which prevails in others would also take place in this contract.

During the last quarter of a century there have been various emergencies in which the credit of the country in general, and of private individuals, has appeared to be affected by the statutes against usury ; and as they have formed the subject of much inquiry, it has also followed as a natural consequence that annuities have also passed under examination. Various different projects were offered relative to these contracts. Sometimes it has been proposed to make annuities irredeemable, at others, to fix certain rates upon which they shall be granted, thereby, in short, extending

the statutes of usury to them ; while, on the other hand, several attempts have been made to obtain a repeal of the Usury Laws. As however none of these projects have yet been carried into effect, it seems unnecessary here to enter into any speculations as to their policy or impolicy. The reader, however, is referred to a short tract by Sir Edward Sugden, published in the "Pamphleteer," vol. vii., where he displays his usual clearness and accuracy, and shows how futile are all legislative attempts to regulate the prices of money-bargains.

The present treatise has been compiled with the view of collecting together all the decisions and authorities which bear upon the subjects of the discussion, and of arranging in order of easy reference a great variety of isolated rules and determinations, which were only to be found after considerable research. The author has only discharged his duty in bestowing his utmost care and diligence upon the subject, and he seeks no approbation on that account ; he rather feels called upon to crave indulgence from the professional reader for his omissions and defects. His predecessors in his path, in the publications to which he is about to refer, have not embraced the extensive plan which he has proposed to himself for execution. These works are the Second Part of Mr. Plowden's Treatise on Usury and Annuities, published in 1797 ; Mr. Hunt's Collection of Cases on the Annuity Act, of which the first edition was pub

lished in 1794, and the second in 1796; Mr. Withey's Treatise on Annuities, in 1800; a short tract by Mr. Blayney on Life Annuities, in 1817; and the Practical Observations lately published by Mr. Ellis upon Life Annuities. All, with the exception of a short chapter in Mr. Plowden's Treatise, relate to the practice of granting life annuities, and refer principally to the former Annuity Act; the last two treatises alone having been published since the 53 Geo. 3, c. 141. It is impossible for the author not to admit that he has derived assistance from all these works, but they have attended him only a small part of his course. He has been also indebted to the valuable notes appended to Mr. Bythewood's Precedents in Conveyancing: and there are other debts, which he hopes will be considered as acknowledged by the references in the body of the work. Knowing that a regular treatise on this subject was still wanted by the profession, he has used his endeavours to satisfy that demand; and if it be deemed that he has not succeeded, he at least trusts that his compilation will be of some use to the reader until the production of another treatise by one whose abilities, if not his diligence, may be greater.

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ERRATA.

Page 18, First side-note, for *rent* read *real*.

37, for *this* read *the*.

37, note (a), for 7 Geo. 5 read 7 Geo. 4.

line 25, for *confined* read *conferred*.

49, second side-note, for 3 read 4.

50, second side-note, for 4 read 5.

96, the side-note should be stated as a question.

165, note (b), for *roll* read *moll*.

192 & 193, for 5 & 6 Edw. 6, c. 17, read c. 16.

212, line 4, for *effected* read *affected*.

259, second side-note, dele *now*.

313, line 6, dele (a), and place it at the end of line 11.

THE LAW

OF

ANNUITIES AND RENT CHARGES.

CHAPTER I.

OF THE DEFINITIONS, NATURE AND PROPERTIES OF ANNUITIES.

CHAP. I. THE DEFINITIONS.

AN Annuity is the grant of a certain sum of money, to be paid by the grantor or his representative, at the expiration of fixed consecutive periods, for a definite term, or for life, or in fee.

Annuity defined.

Formerly the term Annuity referred to the nature of the security on which the grantee relied, and expressed a charge upon the person or personal estate of the grantor only; while a charge upon the real estate of the grantor was signified by the term of a Rent. At the present day an Annuity is applied indiscriminately to every species of security, but a Rent Charge still retains its ancient limited signification. When the Rent was granted to issue out of certain land, and a power of distress on the land charged was also given to the grantee, it was termed a Rent Charge. But when that power was not given it was termed a Rent Seck. The proper remedy for this latter was an assize, but as this was too tedious a remedy, and had therefore almost become obsolete, the statute 4 Geo. II. c. 28, s. 5, enacted, that for all rents seck which had been paid for three years within

Distinction between Annuity, Rent Charge, and Rent Seck.

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Pensions.	
Names of the parties.	The person who grants the Annuity is termed the grantor or seller of the Annuity, he to whom it is granted is the grantee or purchaser, and, in the case of Life Annuities, the person on whose life it depends is the Annuitant, though this last distinction is not always attended to with strictness, in consequence of the grantee being very frequently also the Annuitant.
An annuity is not necessarily annual.	The above definition of an Annuity requires examination, for in some respects it differs from that which is to be found in the Digests. Lord Coke, (a) in a definition which he has given, states it to be "the <i>yearly</i> payment of a certain sum of money." C. B. Comyn, (b) adopting this same definition, declares it to be the grant of an <i>annual</i> sum of money. But although doubtless, when an annuity is considered, the period of a year is generally referred to, and its etymological derivation implies something annual, yet the definition will not be sufficiently accurate if it be confined to an <i>annual</i> payment. In the <i>Termes de la Ley</i> (c) the annuity is defined in general words, for it is there stated to be "a certain sum of money granted in fee, &c." And in an anonymous case in Dyer, (d) the Court thought that a rent granted to be paid every second or third year would be an annuity. Still farther, in Rolle's Abr. (e) an instance is cited from 8 Hen. VI. 6. b, of the grant of a rent of 20 <i>l.</i> , payable at the end of every twenty years, for which an

(a) Co. L. 144 b.

(b) Dig. Annuity, A. 1.

(c) Annuities.

(d) P. 24.

(e) Annuities. The reference, however, seems to be inaccurate.

annuity will lie, though, as it is said, it is not annual. In ordinary practice, at the present time, the payments are generally made at half-yearly or quarterly periods, though certainly the calculations are usually made to refer to that of a year. It seems, therefore, to be more prudent to omit the word *annual* in the definition, in order to avoid any erroneous impression.

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The payments must be made at certain recurring intervals, because occasional payments, however numerous, will not constitute an annuity. As in an example in Dyer, (a) where an abbot covenanted with a man and his heirs to find a monk to serve a chapel every holiday, under penalty of forfeiting for each default 5*l.* to him and his heirs. This was determined to be not an annuity, because it was not annual, that is, because it was occasional only.

Payments must be at certain intervals.

An annuity must not be confounded with the payment of interest on a sum of money lent; for in the latter case the principal is not lost, but is to be repaid; whereas in the former, there is no principal, or it is only to be returned by the annual payments. Hence where a bond was given conditioned to pay the interest on 1000*l.* to the obligee during his life, and the principal to his executors or administrators within twelve months after his death, the Court of King's Bench held this not to be an annuity. (b)

Payment of interest on a sum of money lent is not an annuity.

The only distinction which the law makes is that, which has already been pointed out, between the charge on the real property which is a rent, and that on the personalty which is an annuity. It is wholly immaterial that the grantor has attempted to fix the personal fund on which alone the grant shall be secured; if that security be not land, the grant must be an annuity. Thus if one grant 20*l.* a year out of his coffers, it is an annuity, and all his personalty is liable. So where there was a grant of 40*l.* per annum to be paid out of the clear gains of the alum works, it was held that the grantor could not refuse to pay because there were no gains; for the grant charged the

There can only be a rent or an annuity.

(a) P. 24.

(b) Winter v. Mauseley, 2 B. & A. 802.

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person, and the rest was idle, and the addition of the fund out of which the annuity is to be paid cannot affect the nature of the grant. (a) At the same time the grant may amount to a conditional grant, and the annuity may be dependant upon the continuance of the fund charged, this will, however, be considered in a subsequent chapter. (b) Though the word rent be used, yet if in legal effect a rent be not granted, it will only operate as an annuity. As a grant of an annual rent out of lands in which the grantor has no interest, will bind him as an annuity. (c) Or if a rent be granted out of a rent, it will be an annuity, because a rent cannot be charged upon a rent (d) or any other incorporeal right. A variety of instances are collected by Rolle in his Abridgement, and incorporated by Viner under the title Annuity, E.

Two important cases require to be noticed here, in which there has arisen a question, whether the right granted was an annuity or a rent charge. One was the Earl of Holderness v. Lord Caermarthen. (e) By an Act of Parliament passed 2 Geo. I. his majesty was empowered to grant an annuity of 4000*l.* out of the revenues of the Post Office to the Duke of Schomberg and Leinster and his heirs male, remainder to his right heirs, until the sum of 100,000*l.* should be laid out in land for the said duke and his heirs. By letters-patent his majesty made the grant. This annuity having come into the possession of the Earl of Holderness, he assigned it by deed to a trustee, and afterwards charged it with the payment of his debts. It was objected by his heir at law that this was real property, and therefore the entail could not be barred by the mere deed of assignment. Great reliance was placed upon the fact that 100,000*l.* its redemption price, was to be laid out in land. But Lord Thurlow, Ch. held it to be the grant of

(a) *Smith v. Boucher*, Hob. 248; Hutt. 33.

(b) Chapter VIII. On the determination of the Annuity.

(c) *Anon. Owen*, 3; *Godb.* 132. *Anon. Keil.* 161.

(d) — *v. Cooper*, 2 Wils. 375.

(e) 1 B. C. C. 377.

an annuity perpetual in its nature. That it did not savour of lands, but being merely personal was capable of being conveyed either with or without a fine, and therefore this conveyance was effectual.

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The other case was *Lord Stafford v. Buckley*, (a) before Lord Hardwicke, and was to this effect:—The title to the Carribbee Islands, in the West Indies, had vested in Lord Kinnoul, under an original grant to Lord Carlisle from James I. and it was agreed that this title should be surrendered to the Crown in consideration of an annual payment out of the profits arising to the Crown in respect of the seignory of the island. Accordingly, a sum of 1000*l.* a year was granted to Lord Kinnoul and his heirs out of the duty of 4½ per cent. which is paid to the Crown in specie from the produce of the island of Barbadoes; and the grant was secured by a collateral charge on the rest of the king's revenue. It was urged that these duties, being paid in respect of the seignory of the island, constituted a species of realty, and therefore the annuity charged thereon was properly a rent, and to be treated as real property. But Lord Hardwicke determined that, even admitting the duties to be in the nature of a reserved rent, yet as a rent cannot be charged upon a rent so as to retain the properties of a rent, this could only be considered as an annuity; but he went farther, and held the fund itself to be only an impost, and not a reserved rent, and therefore it was only personalty. Consequently, the grant to Lord Kinnoul was a perpetual annuity. This very property has been lately investigated in the Court of King's Bench, and the opinion of Lord Hardwicke, as to its nature, not disputed. (b)

But it is necessary to consider whether the transaction which is the subject of discussion be the grant of an annuity, or the assignment and sale of a rent entire or in parts, or of some other fund of periodically accruing payments. For though a rent cannot be charged upon a rent, yet this may be transferred, or it may be divided, and a portion of it conveyed, in which case there is neither the

The grant of an annuity is distinguishable from the sale of a rent, or a part thereof.

(a) 2 Ves. sen. 170.

(b) *Aubin v. Daly*, 4 B. & A. 59.

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grant of a new rent charge, as binding upon the party so conveying, nor of an annuity. At the same time, however, the assignment may be conditional, as a security for the due payment of the annuity. In particular instances the determination of this distinction has been attended with difficulty, as it must depend upon the language of the instruments of the grant, and the intention of the parties as deduced from the whole transaction. Thus, if a man recite that he has 20*l.* rent, and grant 10*l.* of the same rent, if he have no rent, this will not operate as an annuity, because he intended to convey what he had as a rent, and not to grant a new rent. As early as the reign of Henry VI. occurred the following case, which is reported in *Tr. T. 9 Hen. VI. p. 12*:—

The queen granted to one Margery Parker the annual rent of 20*l.* for life, to receive out of a certain sum assigned to the queen in part of her dower from the great customs of the city of London, by the hands of the collector thereof. This rent being in arrear, Parker brought an action of annuity against the queen, as for the arrears of an annuity. But it was contended that this was not the grant of an annuity, but only the assignment of a portion of the customs, and that the proper remedy was against the collectors. It was argued at great length, and though the judges do not appear to have been unanimous, yet judgment was ultimately given for the plaintiff, upon the ground, that it was the grant of an annuity, and not the transfer of the customs.

Where a sale of dividends or conditional assignment to secure an annuity.

In modern times questions have arisen from the acts of individuals entitled to the dividends of stock in the public funds. These may be sold and transferred absolutely, or they may be assigned as a security for an annuity. In the consideration of such questions, some elucidation may be obtained from the decisions in the following cases:—

Certain sums(*a*) of money in the funds were conveyed to trustees for the benefit of a married woman, to pay the dividends thereon to her. Afterwards, in consideration of

(*a*) *Hood v. Burdon*, 4 B. C. C. 121; 2 Ves. J. 29.

the advances of money, she agreed to *sell* certain portions of the dividends during the lives of persons nominated in the deed; and her husband covenanted to pay any deficiency from a stipulated sum, if the dividends were insufficient, and a proportionable share in case the grantor died within the days of payment. This was held to be the grant of an annuity, and not the sale of the dividends. The Lord Commissioner Eyre, in giving judgment, said—"I was inclined, thinking this a fair transaction, to bring it to the case of the purchase of these dividends, and I should have been inclined to think it not an annuity. But when the whole case, and the effect of these instruments came to be considered, it is not a purchase of these dividends, and one observation puts it out of doubt. They were to have beyond these dividends so much paid as would make up any deficiency; and it was foreseen that it would happen, that the *cestuy que vie* would die, not upon the day the dividends would be due, and an express provision is made for that case. Therefore it is clear that upon the whole context of the instruments taken together, it was intended to be an absolute annuity." It will be observed, that the use of the words *sell, purchase, transfer, convey*, or similar expressions, will not alter the nature of the transaction, where it appears on the whole to be not an absolute transfer.

In *Dupuis v. Edwards*,^(a) the grantor granted an annuity, to be issuing and payable out of the dividends of 3 per cent. Bank Annuities, and a proportionable part of the said annuity up to the day of the death of the grantor, in case he should die before the expiration of any half-year; and there was a covenant that he would not part with his interest in the Bank Annuities. It was held to be the grant of an annuity, and not the transfer of the stock.

In a subsequent case^(b) there was a proviso that the purchaser should not receive the dividends of the stock growing due at the time of the transaction, but a part only, proportionable to the annual sum granted. The Vice

^(a) 18 Ves. 358.

^(b) *Chareitie v. Vause*, 1 Sim. 153.

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Chancellor held this to be the grant of an annuity, and not the sale of the dividends. But in *Brown v. Like*,^(a) there was no collateral stipulation, and the assignment, according to the judgment of Lord Eldon, was an absolute sale.

In *Scott v. Allnutt*,^(b) very lately before the House of Lords, an heir, entitled to the reversion of a sum of money, arising from the sale of land for the redemption of the land tax, sold his reversionary right to the interest for a valuable consideration; the annual income was taken at a specific sum, and the vendor covenanted to keep it up to that sum. It was urged that this was an annuity, and though no judgment was given upon this point, the Lord Chancellor seemed to intimate an opinion that way.

Ambiguity in determining between a grant of a gross sum or of an annuity, from the nature of the fund charged.

Before quitting the examination of the definition and nature of annuities, it is necessary to notice a difficulty that arises from ambiguities very common in gifts, which refer to a fund, whose name implies an annuity, but from the expressions employed, or other circumstances, the actual extent of the grant is uncertain, as whether a gross sum or an annuity be meant. As if a man should grant 10% of his rent charged on Black Acre. Here it would be doubtful whether he meant 10% a year, or such part of his rent as would be equivalent to 10%. Thus also the stocks in the funds are termed annuities, though the dividends are more properly entitled to such an appellation. Therefore a gift of 100% Bank Annuities is ambiguous, as it may signify Bank Stock of that amount, or so much stock as will give a dividend of such value, probably 2000%. In these cases the intention of the party is to be interpreted from the instruments, though if there be an ambiguity therein it will be lawful to refer to collateral circumstances to enable the Court to form a correct judgment upon the case. Yet external evidence will not be admitted, unless the instrument be so ambiguous on the face of it that its meaning cannot possibly be deduced from it.

Thus, in *Stafford v. Horton*,^(c) a testator, possessed of 300% per annum, Bank Long Annuities, bequeathed to his

(a) 14 Ves. 302. (b) 2 Dow. & Cl. P. C. 404. (c) 1 B. C. C. 482.

daughter 100*l.* a year Long Annuities. "Item, to Dr. S. 50*l.* Long Annuities. Item, to J. B. 50*l.* Long Annuities." Notwithstanding the plain distinction between the first and last bequest, Lord Thurlow interpreted the two latter to be bequests of annuities of that annual amount.

But in a subsequent case, (a) a testatrix bequeathed "to M. P. the sum of 500*l.* stock, in Long Annuities. The same to M. H. To Miss I. L. B. the sum of 200*l.* stock, in Long Annuities, *the interest thereof* (b) to accumulate until she shall attain twenty-one, and then the whole to be transferred to her by my executor. Also, to Miss H. D. 100*l.* stock, in Long Annuities, the annuities to accumulate." And the residue to her nephews. The Lord Chancellor at first held these to be specific bequests of annuities, though with reluctance, as it appeared that the testatrix had only 130*l.* per annum Long Annuities, and no other properties, while the aggregate amount of these annuities would be 1300*l.* per annum. Yet he considered himself controlled by the terms of the will, and not at liberty to travel out of it. On a rehearing, however, he changed his opinion, and allowed the evidence of the testatrix's property to be read, in order to enable him to construe the will. He is reported to have said that he could let in this evidence, not to control the bequests which she had made in words distinct themselves, nor to control a bequest which she had made of a subject, which she had accurately described, but because the words she had used were upon the whole context uncertain, whether she intended it as the interest of a gross sum to accumulate, or 500*l.* per annum. The peculiarity of this will furnished sufficient doubt to warrant the admission of collateral evidence to explain it. When that evidence was read, there could be little doubt of the intention, and he decreed the bequest to be gross sums, and not annuities.

(a) *Fonnereau v. Poyatz*, 1 B. C. C. 472,

(b) See the observations of the Vice Chancellor on the use of these words in this case, 3 Sim. 572.

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But in *Oldham v. Carleton* (a) a testator gave the interest of the 4 per cent. Bank Annuities then standing in his name, and other monies, to be invested in the same stock, to his wife; and as to the rest and residue of his estate, after payment of the said bequest to his wife, he gave it as follows: 1st. to the children of A. 60% of the 4 per cent. Consolidated Bank Annuities, also to the eldest of such children, 30% per annum for life, and to his lawful heir, payable out of the interest of the said funded property. He made a similar bequest in favour of B.'s children, and declared his intention that if the residue of his said property after payment of the children of B. was not sufficient to pay the specific annuities of 30%, the residue should be equally divided as above specified. The money in the banker's hands was invested, and the whole sum amounted to 5300%. The Master of the Rolls held that this was only a bequest of 60% stock, and not of annuities to that extent, for whatever might have been the intention of the testator, the language was clear.

Another case (b) has occurred where the ultimate decision was conformable with that in *Oldham v. Carleton*. A testatrix gave to the minister of A. 3% per annum Bank Long Annuities, to the minister of B. 5% per annum like Bank Annuities, to the treasurers of C. and D. 100% Long Annuities stock each; to the governors of E. 100% Long Annuities stock; 30% per annum further part of my Bank Long Annuities, in trust to receive and apply the dividends and yearly proceeds thereof to the use of L. D. till she attained twenty-one, then to transfer the said 30% per annum Bank Long Annuities to her own use. She then gave 150% Bank Long Annuities stock to Mr. C., and 10% per annum further part of her Bank Long Annuities to pay the dividends thereof to Mrs. G. By a codicil she stated, that as she might have made a wrong calculation of the value of her fortune in the funds, at the uncertain price they might be at her decease, she desired any deficiency to be made up out of her personal estate. She died possessed of 385%.

(a) 2 Cox's Cases, 399.

(b) A. G. v. Grote, 3 Mer. 316.

Long Annuities only, and her personal estate was insufficient to pay her debts. It was held by the Master of the Rolls, that the will was not so ambiguous as to raise a belief that she meant to give a portion of stock equal in value to the sums mentioned; but he decided that specific bequests of annuities had been given. He referred to *Stafford v. Horton*, and distinguished *Fonnereau v. Poyntz*, because of the great disproportion between the property and the bequest there, which was not the case in the present instance. (a) The annual amount of the bequest was in this case 500*l.*, which was 115*l.* less than the actual property, besides which, it will be observed, that there was a bequest of the residue in the former, but not in the latter.

This subject has since been discussed before Sir T. Plumer, Master of the Rolls, (b) and the authorities were examined at great length. He there supported the decision of *Fonnereau v. Poyntz*, and as the bequests were ambiguous on the face of the will, admitted evidence to prove the value of the testator's property, and thereupon decreed them to be bequests of the specific sums, not of annuities. While, on the other hand, in a very late case, where a testatrix bequeathed to A. B. and C. D. "50*l.* each of Bank Long Annuities stock now standing in my name," the Vice-Chancellor, Sir L. Shadwell, held, that each of the legatees was entitled to a specific legacy of 50*l.* Long Annuities, and refused to admit the evidence of the state of the testatrix's assets. (c)

So a bequest of an annuity of 200*l.* to A. for the use of her and her children, to be paid out of the general effects of the testator, until it should be convenient to the executors to invest 5000*l.* in the funds in lieu thereof for her and their use, and to the longest liver of her and her children, subject to an equal division of the interest, while

(a) This judgment was however reversed, on an appeal, by Lord Eldon. 3 Sim. 569, n.

(b) *Colpoys v. Colpoys*, Jac. 450.

(c) *Boys v. Williams*, 3 Sim. 563.

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Again, where a sum is to be laid out in the purchase of an annuity, and it is uncertain whether that is to be the value of the annuity, or the annual amount.

more than one was alive, was held by the Master of the Rolls and the Lord Chancellor, on appeal, to be the legacy of an annuity only, and not of the gross sum. (a)

It was holden, in Lord Coke's time, that a grant of 10*l.* to N. M., issuing and payable quarterly at the four most usual feasts, out of certain lands, with a power of distress, was a grant of a rent to N. M. for his life. (b)

There is another class of cases in which a similar ambiguity has arisen, and it is, where a certain sum of money is directed to be laid out in the purchase of an annuity, and it is doubted whether the sum mentioned is to be the value of the annuity or the annual payment. This is also a subject of construction dependent upon the intention of the party. The following cases may afford some advantage in elucidating analogous discussions.

In *Bayley v. Bishop* (c) a testator directed trustees to lay out a sum of money upon government or other securities in the purchase of an annuity for the life of his son, and that they should permit him to receive the same during the term of his life. This was held to be a direction to purchase an annuity of that value; and not merely a bequest of the dividends that would arise therefrom; since the testator, in several other dispositions of stock, provided for the capital and dividends.

In *Rawlings v. Jennings* (d) there was a bequest to the testator's wife of "200*l.* per year, being part of the monies I now have in bank security, entirely for her own use and disposal;" and in other parts of the will interests for life were expressly given. The Master of the Rolls, Sir William Grant, held her to be entitled to as much capital stock as would produce 200*l.* a year, relying much upon the words "her own use and disposal," and also upon the mode of the other bequests.

In *Smith v. King* (e) it was declared by a marriage settlement that a trustee was to lay out a sum of money which

(a) *Innes v. Mitchell*, 6 Ves. 464; 9 Ves. 212.

(b) *Sir R. Pexhall's case*, 8 Co. 83. b.

(c) 9 Ves. 6.

(d) 13 Ves. 39.

(e) 1 Russ. 263.

the husband had agreed to settle, in the purchase of any public stock, or funds, or annuities, for the life of his intended wife, in trust for her, and that he was to pay to her during her life, the dividends or other produce of the stock or annuity so to be purchased to her separate use during her life. It was held by the Court that the wife was entitled absolutely to a sum of 3 per cent. stock purchased with the money, and not to a life-interest only, there being no limitation over of the fund after her death.

And in *Borrett v. Deady*(a) a testator directed his executors to convert his property and invest it in stock, and thereout to pay an annuity of 250*l.* to his widow for her life, and after her death gave the principal sum that produced that annuity over. The property was not sold and invested till after her death. The Vice-Chancellor held that the legatees were entitled to as much stock as would produce 250*l.* a year in dividends, and not merely to a principal sum of 5000*l.*

In all these cases of ambiguous grants, it seems impossible to state any precise rules to guide the interpretation. Every case depends upon its own circumstances, from which the intention must be deduced; though some assistance may perhaps be attained from the consideration of the above instances, wherever applicable.

Such being the nature of annuities, their properties may be properly examined in the next place. These, so far as they are peculiar to these contracts, range themselves into two classes, according to the real or personal nature of the security as above pointed out. The distinction which prevails between these two kinds of security has produced a corresponding distinction in the properties of annuities and rents.

First, as to annuities specifically so termed. As the security is personal, they can only be treated as a species of personality. Hence, if an annuity continue after the decease of the grantee, it may be bequeathed by testament, and where not specifically bequeathed, will pass to the

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(a) 3 Madd. 449.

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grantee's executor. (a) In the case of intestacy, it will be distributable according to the statutes of distribution, when the grant itself does not point out the order of succession. Even where it is granted in fee, a widow cannot claim dower out of it, (b) and also it may seem that there can be no tenancy by the curtesy of it, though the husband, as his wife's administrator, may perhaps have some claim to it as part of her personal effects. It does not constitute assets in the hands of an heir, for it is a mere right and chose in action. (c) Hence, also, it cannot be taken in execution as a chattel, and is not extendible. It seems also, that as an annuity, it is not forfeitable on the felony or treason of the grantor, at least beyond his life. If it be secured by a bond, that indeed will vest in the crown, if there be a breach before attainder. Yet, where an act of parliament had attainted a person and declared that his hereditaments should be forfeited, it was resolved that an annuity of inheritance, which was an hereditament, was forfeited (d) It has also been admitted that stock in the funds, which is a right to the enjoyment of a perpetual annuity, and has been made personal property by statute, is forfeitable on felony to the crown. But though personal property, it has so far locality, that where there had been a grant of the goods in a manor, of the tenants thereof who might be convicted of felony, it was decided that stock in the funds belonging to a felon convict would not vest in the grantee. (e)

As it does not concern lands, and is not a tenement, it is not within the statute *de Donis*, and cannot be entailed, nor can there be a remainder limited to it. (f) At the same time Lord Rosslyn seemed to be of opinion that an annuity might be limited by way of executory devise, subject

(a) *Savery v. Dyer*, Amb 140. *Aubin v. Daly*, 4 B. & A. 59.

(b) *Perk. Dower*, § 347, 373.

(c) *Doct. & St. Dia.* I. c. 30. *T. de la Ley*, Annuities.

(d) *Nevil's case*, 7 Co. 124.

(e) *K. v. Capper*, 5 Pri. 217.

(f) *Co. L.* 20. a; 7 Co. 33. b. (122. b.) *Lord Stafford v. Buckley*, 2 Ves. sen. 180.

to the rules against perpetuity. (a) It was decided by Lord Hardwicke that where a long annuity was so limited in a will, that if it had been a real estate an entail would have been created, it vested absolutely in the first tenant in tail. (b) And in the case of the Duke of Montague, there was a bequest of an Exchequer Annuity in trust for B. for life, and after his death in trust for such person as should be heir male of his body for the residue of the term, and in case there should be no such heir male, in trust for the heir male of the body of C., and in case there should be no such person, then over. B. died without issue male, and C. had a son. It was held by Lord Northington that the annuity vested absolutely in C.'s son, who was the first tenant in tail, and, therefore, on his dying intestate and without issue, his father was entitled to it, being his administrator. This judgment was affirmed on appeal to the House of Lords. (c)

As the law only admits an executory devise of chattels real, and such a devise of chattels personal is only valid in equity, it may be thought that there can be no such a limitation of an annuity to be available in a court of law.

In regard to the restriction on the grant resulting from the rules against perpetuity, it will be remembered that no landed property can be devised or granted so as to prevent alienation after a period exceeding twenty-one years and a few months, from the expiration of a life in being at the death of the deviser, or at the time of the grant. And it seems that in the application of the general principle to annuities, the courts of equity will follow the analogy afforded by the decisions on real estate. A. covenanted to settle an annuity in trust for his wife's separate use during the marriage, remainder on the death of either, to the survivor, remainder to their children, and in default of any such child or children remainder to his executors or administrators. A child survived, but died under age. It was ad-

(a) *Turner v. Turner*, 1 B. C. C. 324.

(b) *Ivie v. Ivie*, 1 Atk. 429.

(c) *Lord Beaulieu v. Lord Cardigan*, Amb. 533. *Duke of Montague v. Lord Beaulieu*, 3 B. P. C. 277. *Ed. To.*

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mitted by the Lord Chancellor that this limitation being the same as a limitation on default of issue, was too remote. (a) In a late case a testator, having bequeathed a yearly sum to a person for life, gave the annuity, on the death of the first grantee, to the eldest surviving son of A., and failing the male issue of A., to the daughters of A. living at the decease of such male issue. At the death of the first grantee, A. had no son living, but had two daughters. It was held that the gift to the daughters was not too remote. (b)

An annuity may be an hereditament, and descend as real estates.

But there is a peculiar property belonging to an annuity which requires some more attention. Not only is it personal property, but it may also be an hereditament; it may be granted so as to *descend* upon the heir or successors as realty, on the death of the grantee, and not pass to his executor. This depends upon the terms of the original grant, which may contain this limitation. Thus an annuity may be granted to a man and his heirs, or to a man and the heirs of his body, while no other personal property can be so granted. Hence it has been thought not quite accurate to treat this in all cases as personal property, but that it is to be considered personal as regards the remedy for it, but real as to its quality of inheritance. The observations of Lord Rosslyn in *Turner v. Turner*, (c) will farther elucidate this property. Speaking of an annuity in fee, he says, "Cases of this kind do not happen often, but the law is clear as to this kind of property. It has been a little argued that this must always be considered as personal property. But this is not so, for from the earliest period of the law this species of property has been as clearly distinguished as either real or personal estate. Fitzherbert, tit. Annuities, has defined it, that it either proceeds from the lands or coffers of another. His definition is mostly copied (though with additions) from (d) Co. Lit. 144. b. Where it is

(a) *Basse v. Grey*, 1 E. C. A. 363; Gilb. E. C. 97.

(b) *Murray v. Addenbrook*, 4 Russ. 407.

(c) 1 B. C. C. 324.

(d) This was an error; Fitzherbert's Abridgement was published before Lord Coke's Commentary.

charged on land, it may be real or personal, at the election of the holder, he may proceed against the land or against the person. If it is out of the coffers it is personal only as to the remedy, but the property itself is real as to its descent to the heir. An annuity then, when granted with words of inheritance, is *descendible*, but as to its security it is personal only. It may be granted in fee, of course it may as a qualified or conditional fee."

But this descendible property does not take away the grantee's ownership in the grant. If the annuity be granted to a man and his heirs, he may dispose of it as he thinks proper, and may release it to the grantor. If it be granted to him with a limitation in tail, the grant operates as a conditional fee, and by analogy to that estate in land at the common law, the heirs may be barred by the grantee's release or other disposition of the property (a). If indeed it were otherwise there would be a perpetual entail, as no recovery can be had of it.

Where the annuity arises from the income of certain personal property, if it be granted in perpetuity, the grant in law amounts to a gift of that property, from which it arises; the grantee may dispose of it as he deems fit, and thus the annuity will cease as such in his hands. Indeed the law will not allow personal property to be so appropriated, as that an annuity only shall be taken from it and the principal shall be inalienable for ever (b).

The principal from which a personal annuity arises cannot be rendered inalienable for ever.

It is still so far personal property that though Lord Hardwicke, referring to the Doctor and Student, said it would not go to executors by their being named (c), yet the Court of King's Bench has since decided, that a residuary clause in a will, bequeathing all the rest, residue and remainder of a testatrix's personal estate, of what nature or

(a) Co. Lit. 20. a; Poph. 87; Plow. 3. Buckeridge v. Ingram, 2 Ves. jun. 663.

(b) Smith v. Pybus, 9 Ves. 566. Page v. Leapingwell, 18 Ves. 463. Britton v. Twining, 3 Mer. 176.

(c) Lord Stafford v. Buckley, 2 Ves. sen. 179.

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Not liable to rent charges.	Annuities are not liable to any of those charges which are imposed upon the real estate, and therefore not to the sewer rate, even though it be paid by a corporation, who can only be charged by reason of the possession of land (b). What duties annuities are liable to will be seen in the next chapter.
2d. Properties of Rents.	Secondly, as regards Rent Charges. These are essentially real property, and their properties are consequently such as attach upon all realty. Although there was some doubt whether a rent charge was devisable at common law, as land was not (c), yet the Statute of Wills, 34 Hen. 8, c. 5, expressly confers upon the party having any estate or interest in rents the power of devising the same. Where there is only a chattel interest in the rent, the grantor it seems might have bequeathed it by testament and may still.
Devisable.	
Descendible.	In cases of intestacy a rent descends upon the heir, unless otherwise provided in the grant. In regard to which descent the nature of the land on which it is charged must be considered, for it follows the same course of descent as the land itself would. Hence, if it be charged on gavel-kind lands, the rent will descend to coparceners; or if on lands in borough-english, it will descend to the youngest son. (d) But where there is a charge upon different lands, in some of which the common law prevails, in others the custom, then the descent shall be regulated by the common law, which, by its superiority, overrules the custom. (e) The case of a rent charged on lands, where different customs prevail, has not occurred, but would be attended with difficulty.
Course of descent.	
	Again, the consideration for which the rent was granted will also operate on the course of descent; as, if a rent

(a) Aubin v. Daly, 4 B. & A. 59. (b) Com. Dig. Sewers, E. 5.

(c) Gawan v. Ramtes, Cro. El. 804; Mo. 625.

(d) Randal v. Writtle, 2 Lev. 87; 1 Mod. 97; 3 Keb. 165, 214. Stokes v. Verrier, 1 Mod. 112; 3 Keb. 292. Edwin v. Thomas, 1 Vern. 489.

(e) Smith v. Lane, 1 And. 191. Randal v. Roberts, Noy, 15.

be granted to a parcener on equality of partition, it will be descendible as the land which descended in coparcenary, even though the parcener's heirs were not mentioned in the grant of the rent. (a)

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The widow of the grantee of a rent is entitled to dower out of it; (b) and there is a tenancy by the curtesy for the husband, of a rent, of which his wife has been seised during marriage, unless indeed the estate in the rent has been suspended during the whole of that time, in which case the husband is not entitled. (c) A suspension for term of years does not defeat his right. The wife must, however, have been seised of the rent; but it seems a seisin in law will be sufficient, where a seisin in fact could not have been obtained. As when the wife died after the rent had devolved upon her, but before any payment became due. (d)

Dower and
tenancy by the
curtesy.

Again, it is necessary that the rent should continue after the marriage, or that the wife's interest therein should be of a continuing estate; for the husband cannot claim his curtesy out of rent granted to his wife for her life. But if it were granted to her in tail, and by her death without issue, that limitation could not take effect; still, as she was seised in tail during her marriage, the rent shall remain to the husband after her death. (e) The same observation, of course, applies to dower: there, also, the rent must continue, to give the widow a right to it. Thus, where a rent was granted to one in tail, and the reversion in fee to the proprietor of the land, the tenant in tail having died without issue, it was held that his widow could not claim her dower, because the right was no longer in existence. But if the reversion, it is said, had been limited over to a stranger in fee, the widow of the tenant in tail would have been endowed. (f)

The rent must
continue after
the marriage is
ended.

(a) *Browning v. Biston*, Plow. 134; Co. L. 177. b., 169. b.

(b) *Perk. Dower*, § 347.

(c) Co. L. 29. b.; *Perk. Tenant by the Curtesy*, § 461.

(d) *Perk. Ib.* § 469; Co. L. 29. a; see *Dethick v. Bradborn*, 2 Sid. 110, 117.

(e) Co. L. 30.

(f) *Chaplin v. Chaplin*, 3 P. Will. 230.

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A rent may be entailed, and a remainder may be created out of it.

A seisin in law would also confer a right to dower of a rent. (a)

As a rent is a species of realty, not only may the grantor prescribe the course in which it shall descend, and thus limit it in tail and create a remainder out of it, but also the party who becomes entitled to a rent already existing may, in like manner, limit its future descent, and create a fresh remainder out of it. (b) It was thought that the limitation of the remainder was in the former case invalid, because the grantor having granted the particular estate, which was created by himself, there was no continuing estate to support the remainder. But the answer given to this opinion was, that the whole grant should be taken together, and then its effect is a grant of the estate to the extent reached by the remainder, out of which the particular estates might be carved. Thus a rent granted to A. for life, remainder to B. in tail, remainder to C. in fee, was in effect the grant of a rent in fee, divided into three estates—the first for life, the second in tail, and the third in fee: but it is requisite that the remainder must be limited in the same instrument, as contains the grant of the particular interest. Thus then not only may a rent be limited in remainder, but it may be also the subject of an executory devise. (c)

A new rent may be created to commence hereafter.

As the freehold of land can never be in abeyance, the grant of an estate of land to commence hereafter is invalid, but that is not so in respect to a rent. When it is newly created, the grantor may give to it such existence as he thinks fit, and may direct it not to commence till a future time, or till the happening of some contingent event. (d) But it is otherwise with a rent already existing. There the freehold cannot be interrupted, and if the grantor should convey over the rent, it must pass presently; whereas, if

(a) Perk. Dower, § 373.

(b) *Smith v. Farnaby*, 1 Sid. 285; 1 Lev. 144; Cart. 52; 1 E. C. A. 359; 2 Keb. 29, 55, 84; *Weeks v. Peach*, Salk. 577; 2 Lutw. 1218; *Anon. Moore*, 30.

(c) *Carter*, 52.

(d) *K. v. Kemp*, Salk. 466; *Plow. C.* 152, 155, 197; *Osmere v. Sheaf*, Carth. 308.

the grant is to take effect at some future time, there will be an inconsistency therein, as the estate of freehold will be in the grantor and his alienee at the same time. The former should reserve a particular estate for himself until the time arrive when the grant is to take effect. The law will not supply this reservation if it be omitted, but will rather hold the grant invalid. By the means of uses, however, an old rent may be conveyed so as to commence in the future, as by a covenant to stand seised to uses in consideration of love and affection. (a)

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There is also another distinction between land and a rent; depending upon a principle, that the estate in the former cannot be made to vest, and then cease, and re-vest again; whereas there is no objection to the creation of such a stipulation in the latter. Thus it has been decided that a rent may be granted with a condition, that when any heir of the grantee should be within age, it should cease during his nonage, and re-vest on his attaining his majority. In the case of land, there might not be a proper tenant, if such an estate could be granted, but the rent is purely the gift of the grantor, which he may modify as he thinks fit. (b) It is this which renders valid the power sometimes granted to the grantee to enter upon the lands, on the event of default in payment, and hold them till he is satisfied, and then give them up.

A rent may be made to cease and then re-vest.

Again, a rent is assets, and may be taken in execution on an elegit, or on an extent, where it is of a freehold interest, or on a fieri facias where it is of a chattel interest. (c) Hence it is subject to the same liens as land itself, namely, judgments, statutes, &c.

Rent may be taken in execution.

It will also afford a qualification as land, as the grantee of a freehold interest in a rent to the requisite value will be qualified to sit as a member of the House of Commons, to act as a justice of the peace, or to exercise his elective franchise in voting for knights of the shire.

Will confer qualification as land.

(a) *Osmere v. Sheaf*, Carth. 308; 3 Lev. 370.

(b) *F. C. R.* 527; 6 Co. 41.

(c) *Dyer*, 306. b.; *Lillingstone's C.* 7. Co. 38; *Moore*, 32.

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How forfeited.

The rent does
not give any
right in the soil.

So one who has a freehold or higher estate in a rent to the amount of 10*l*. above reprises, is qualified to act as a juryman. (a)

In regard to a forfeiture for treason or felony, it is stated by Lord Coke, in 3 Inst. 21, that if a man be seised of a rent charge in fee that is not holden, and is attainted of felony, the king shall have the profit during his life; but after his death, seeing his blood is corrupted, it cannot descend to his heir, nor can it escheat, because it is not holden; it perishes and is extinct in law. (b) By the statute 54 Geo. III. c. 145, corruption of blood is confined to treason and murder, so that the ground of extinction fails as to other felonies, and probably it would not now be held that the heir was deprived of the annuity.

The owner of a rent is liable also to such charges as are imposed upon land, as the sewer rate (c) and the land tax, of which occasion will recur to treat more at length hereafter.

But it must be observed, that though a rent charge constitutes a right which issues out of land, yet it gives no interest in the soil itself to the grantee. Hence it was held by the Court of King's Bench that the grantee of an annuity, charged on a leasehold estate, did not gain a settlement by residing on the premises charged, as residing on his own estate. (d) And Lord Mansfield said, if it had been charged on a freehold, it would not have given a right to live on that freehold. But where, by way of securing the payment of the rent, a power of entry on the land is granted to the grantee on default of payment, then, as will appear hereafter, he gains such an interest in the soil as will enable him to maintain an ejectment for the same when the right has accrued.

Although at law a rent is always real property, yet in

(a) 6 Geo. IV. c. 50. s. 1.

(b) See also Bro. Abr. Corodie, 5.

(c) Com. Dig. Sewer, E. 5.

(d) K. v. Stockley Pomeroy, Burr. S. C. 762. See also K. v. Belford, 10 B. & C. 54.

equity, in cases where it has been granted as a security for the loan of money, it is, like other mortgages, treated as personalty, and the redemption money, if paid, will go to the executor, and not the heir. Therefore, in a case where a rent charge of 20*l.* was granted to A. and his wife, and A.'s heirs, in consideration of 240*l.* with a proviso for redemption on repayment of the consideration to the grantee, or his heirs, within a year after the wife's death, on notice, Lord Nottingham held, that on repayment to A.'s executors, the rent charge ceased, it being considered as a mere security for money advanced. (a) So a rent, subject to a power of redemption, was devised to a married woman in fee, and was redeemed in her lifetime. The principal money paid on redemption was held to vest, on her death, in her administrator, and not in her heir. (b) The power of redemption reserved to the grantor is a strong fact, from which the nature of the transaction may be deduced, and will lead the Court to hold it to be only a security for money lent, and not the absolute sale of a rent. (c)

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Rent, when granted as a mortgage, is personalty in equity.

It now becomes proper to examine a property of great importance at law, affecting both species of annuities, namely, the power of assignment. Here again the distinct nature of the two contracts points out a manifest difference. It is a well established rule, that an interest in land, or one which lies in grant, may be assigned by the possessor to any other person, subject to this proviso, that no condition against alienation be contained in the grant expressly or impliedly. One instance given by C. B. Comyn (d) of this power of assignment, is a rent, which is an interest in land, and moreover lies in grant. A rent charge, therefore, of any extent, is assignable, and may pass from the grantee. But, to prevent maintenance, the law prohibits the assignment of mere personal obligations, and consequently an annuity

Assignable property of annuities.

(a) *Stokes v. Verrier*, 3 Swa. 634 ; see *Longuet v. Scawen*, 1 Ves. S. 402 ; *Anon.* 2 E. C. A. 615 ; *Kendal v. Micfield*, Barn. C. R. 46.

(b) *Stewkley v. Henley*, 2. 8^o. Rep. in Ch. 166.

(c) *Longuet v. Scawen*, 1 Ves. S. 402.

(d) Dig. Assignment, A.

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which is only secured by such an obligation, ought not, according to legal principles, to be assignable. The rule, however, which is supposed to prevail, is not certain, or, if it be so, is inconsistent with this otherwise general principle.

Where the annuity is of indefinite duration, so as, in contemplation of law, to be a perpetual annuity, then another legal principle, namely, that the alienation of perpetually existing property cannot be prevented, becomes applicable, and has prevailed. Hence, when an annuity has been granted to a man and his heirs, which the law considers as a perpetual estate, if the grantee cannot assign it, a perpetuity will be created, and be inalienable. Accordingly, such a perpetual annuity is holden to be assignable entirely, or lesser estates may be carved out of it, as an estate for life, or for term of years.^(a) Yet this determination has not been obtained without some struggle; and it may be right to examine the authorities, some of which are very ancient. As early as the reign of Edw. III. occurred this case.^(b) Three priests brought a writ of annuity against the abbot of T., and counted that one John, bishop of Hereford, being seised of an annuity by prescription, founded a chapel, and appointed three priests, and granted this annuity for their maintenance, which was now in arrear. Belknap objected that this was a personal action, which bound the person, and not the soil, that they claimed as assignees, for whom this action would not lie, more than debt. Thorpe, C. J. said, a man may be inheritable of an annuity, and therefore he may make an assignee of it. Brooke, to his abridgment ^(c) of this case, adds, *Quære car non admittitur*. In the report, however, it is stated that they pleaded over and traversed the Bishop's seisin.

Again, a case is reported at great length in Hilary Term, 21 Edw. IV. p. 20, 74, 84, to this effect: The predecessor of the prior of Huntingdon had recovered a judgment in

(a) Jenk. Cen. 236, cited by Bosanquet, J. in *Mirehouse v. Rennell*, 8 Bing. 494.

(b) 41 Edw. III. p. 27.

(c) *Annuities*, pl. 18.

Annuity against the predecessor of the defendant. The present prior sued out a scire facias on the judgment. The defendant pleaded that the predecessor had granted the annuity to one A. C. for life, who was still alive. It was objected for the plaintiff that this was a bad plea, because the annuity being a personal thing lay in action only, and could not be assigned. Catesby, J., thought the grant good, *because it was an inheritance*, which may always be granted, unless some personal service is required by the original grant, as where it is for counsel. According to the report in page 74 the plea was held to be good.

Brooke^(a) cites an observation by Ascue, J., in Hen. VI. 42, that where a man has an annuity to him and his heirs, he may grant it for term of life, or otherwise. *Quod nemo negavit*. But he adds, "*quod quære*, for it is in a manner but a chose in action." Perkins,^(b) having stated the opinion of some, that the grantee may grant over an annuity granted to him and his heirs, because the *inheritance is in him*, adds, "*tamen quære*, for the grantee hath not any remedy for it but by way of action." It may thus be seen, that there was much doubt raised by the conflict of these two principles, but that which prevented the restriction upon alienation prevailed. No question was raised in the cases above cited, where it was shown that such annuities might be bequeathed:

But where the annuity is of definite duration, so as not to amount to a perpetuity, as for a term of life or years, the rule cannot be laid down with certainty; yet, on a more careful examination of the authorities, the more correct opinion seems to be, that such an annuity is not assignable. On principle there is nothing to oppose to the application of the general rule, it is clearly a personal obligation, and there is nothing in its nature which requires an assignment. Yet, Mr. Hargrave^(c) states, that "the doubt as to whether an annuity was assignable or not, which in strictness of law carried force with it, was overruled in a case in C. B. 3 Cha. I., *Gerrard v. Boden*."

(a) Annuities, pl. 19. (b) Grants, s. 87. (c) Note to 1 Inst. 144. b.

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In some instances, perhaps, there has been an inaccuracy, arising from the want of distinguishing between an annuity and a rent, and from the not adverting to the principle involved in a perpetual annuity, which does not exist in one of limited duration. However, Perkins, in his continuation of the passage above referred to, (a) adds, "*quære*, if the annuity had been granted for term of life, &c." And in s. 101, he says, "if an annuity be granted unto me, *pro consilio in posterum impendendo*, I cannot grant it over, if it be not granted to me and my assigns; and *quære* whether I may then grant it." In this passage, undoubtedly, he is considering the effect of the implied condition contained in the grant, and as to this point, the doubt is answered against him in Maund's case. (b) In Sheppard's Touch. 238, it is said, "An annuity, it seems, is not grantable over after the first creation of it. And yet, if an annuity be granted to J. S. and his assigns, *pro consilio*, it seems this annuity is grantable over." Now, as Mr. Hargrave remarks, the addition of the word *assigns* cannot remove the legal objection, and the observation in the Touchstone arises from an inaccurate reference to Maund's case. There it was held, that the word *assigns* in the grant rendered the contract assignable. But, in the first place, the subject-matter of the grant was a rent charge, and the question was discussed in an action of replevin; therefore, though it were held to be assignable, there could be no application of the case as an authority to an annuity. Again, the real question was, whether a rent, to which is attached at law an implied restriction against alienation, can be alienated when the grant is made to a man and his assigns, and it is held that the right of assignment does exist, because *modus & conventio vincunt legem*, which maxim has never been carried so far as to authorise the assignment of a chose in action.

In Diggs v. Chute, (c) Anderson, C. J., says, "an annuity is a personal thing, for the grantee has no other remedy but by action, yet it is not a chose in action." Here the

(a) Grants, s. 87.

(b) 7 Co. 28.

(c) Moore, 134.

subject-matter of the case was an annuity in fee, and it is probable that the Chief Justice did not contemplate a definite annuity. So also there is a remark in an anonymous case in Owen,^(a) that "an annuity is more than a chose in action, for it may be granted over." If it be not a chose in action, no doubt it may be so, but it seems impossible to find any other division of property under which it can range. That case, however, appears to have been *Sharp v. Pool*, and is reported in several other books,^(b) from which it appears that it was a rent granted to a married woman, which was the subject of discussion, so that the remark, if it be construed as applying to a personal annuity, was, to say the least of it, extrajudicial. Lord Coke having stated that not only the grantee but his heirs, and his and their grantee also, shall have a writ of annuity,^(c) is thought to import that the annuity is assignable or transferable of its own nature.^(d) Yet this observation may well be referred to annuities of inheritance, which it is admitted are assignable. A much stronger passage occurs in p. 292. b. of his Commentary, where he says, "If a man hath an annuity *for term of years or for life*, or in fee, and he, before it be behind, doth release all actions, this shall not release the annuity, for it is not merely in action, because it may be granted over." He refers to 5 Edw. IV. 45,^(e) where such an opinion was expressed by the counsel in argument, but it was not involved in this question before the Court, and no notice was taken of it by the judges.

The case of *Gerrard v. Boden*, in *Hetley*,^(f) has been relied on by Mr. Hargrave as settling this point, and it is cited in *Viner's Abrid.* but it is not entitled to any weight whatever, for it is nothing else than the perfectly literal translation into English of the French report of *Brooke v. Baker*, in *Dalison's Rep.* p. 5, with this singular distinction; the names of the parties, as well as those of the

The case of
Gerrard v.
Boden is no
authority.

(a) P. 3.

(b) 4 Co. 51. a ; 1 And. 47 ; Benl. 33.

(c) Co. L. 144. b.

(d) See *Plowd. Ann.* 239.

(e) Should be p. 42.

(f) P. 79.

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judges and counsel, are changed. In Dalison, the names of the counsel and judges are, of course, those existing in the 3 Edw. VI.; in Hetley, they are of those in the 3 Cha. I. Probably, this translated case was found among the papers of the reporter, who did not publish them, and the editor, not recognising the names, changed them to those at the time to which he has referred the case. No reliance can, therefore, be put upon it.

But *Baker v. Brooke* requires more attention. It occurred, as was said, in 3 Edw. VI., and is reported in several old authorities.^(a) According to the report in Dyer, one Brooke, the parson of Bosworth, granted a certain annuity or annual rent to one Medley, issuing out of his rectory, to have, levy, and take to him and his assigns, during the life of the grantor, and it was granted *pro consilio impenso tantum*. The grantee made a grant of this over, and for the arrears after the grant the second grantee brought a writ of annuity. The defendant demurred, and objected that the annuity was not assignable. And, says Dyer, there was much doubt and argument at the bar, but he concludes, *quære bene*, for no judgment is entered on the roll. Moore, Bendloe, and Dalison report the same case, and state that the parties compromised, though the judges expressed their opinion that the assignment was valid. Montague, C. J., according to Dalison, said that the annuity could be granted over, and is not so entirely in the personalty as had been contended. "In some books," he added, "it is said that a release of actions personal is not a good plea in a writ of annuity." It seems too much, upon the authority of this case, to oppose the application of the general principal. No judgment was actually given; and the opinion of the judges was, therefore, extrajudicial; it is not reported at length, but what Montague said was not consistent with the authorities already referred to as to the nature of annuities. If, as has been shown, this had been an annuity of inheritance, though still a chose in action, it would have been assign-

(a) Dyer, 65; Moore, 5; Bendloe, 34; Dalison, 5.

able in consequence of the inheritable quality, but it was only a life interest. This distinction was not pressed upon, nor noticed by the Court. In the absence of all other authority there seems not to be sufficient ground for holding that any annuity of definite duration is assignable by the grantor in a court of law. On reference to the practice of conveyancers, it will be found, that in assignments of life annuities there is usually contained an appointment by the assignor of the assignee, as his attorney, to recover the annuity in his name, though for the benefit of the latter, in any court.

As the assignment of obligations and choses in action is recognized in a court of equity, although the assignee of an annuity cannot prosecute his claim in a court of law in his own name, yet, if he cannot use the name of the assignor, who was the original grantee, there, he can enforce his claim in equity.

Assignment
valid in equity.

But although there be this doubt as to the validity in a court of law of the assignment by the grantee himself, yet an assignment will be valid which takes effect by operation of law. Thus, by marriage, the grant of an annuity to a woman is assigned to her husband. So, on the death of the grantee, if it continue, it passes to the executor or administrator. Again, under the Bankrupt^(a) and Insolvent Debtor's Acts, as all the property of the bankrupt and insolvent vests in, or is conveyed to the assignee by the force of these statutes, an annuity also is assigned by the mere operation of law. It has, however, been provided by the different Insolvent Debtor's Acts,^(b) that as persons may be entitled to annuities for their own lives, under such circumstances that the immediate sale thereof for the payment of their debts may be very prejudicial to them, and deprive them of the means of subsistence, which they might otherwise have after payment of their debts, the Court has power to make such order as under all the cir-

Assignment by
operation of law.

(a) 6 Geo. IV. c. 16, s. 12; 1 & 2 Wm. IV. c. 56, s. 25.

(b) 53 Geo. III. c. 102, s. 12; 1 Geo. IV. c. 119, s. 8; 7 Geo. IV. c. 57, s. 21.

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cumstances may seem reasonable as to the management of the property.

A case is reported in *Vernon*(a) which is not altogether consistent with the general assignment in bankruptcy. A father covenanted on his son's marriage to pay his son during his own life 15*l.* per annum. The Court of Chancery held that the son's assignee, after his bankruptcy, could not claim the payment of the annuity, it being an agreement with the bankrupt of which the assignee could not claim the performance. It may, perhaps, be doubted whether such determination would now be given after the consideration of the cases about to be cited.

Only what the bankrupt is legally and equitably entitled to passes.

Of course the assignment only carries such interest as the bankrupt is legally and equitably entitled to, and therefore an annuity secured to a wife for her separate use will not pass to her husband's assignees.(b) If the wife's annuity has not been settled to her separate use, and therefore will pass to the husband's assignees, yet, if it be necessary to apply to a court of equity to enforce payment, that court will require the assignees to make an equitable settlement upon the wife out of the annuity before they will be allowed to receive it.(c)

Prevention of assignment.

Where the rent or annuity is of perpetual duration, its assignment cannot be prevented by any condition to be imposed by the grantor. But where it endures for a fixed and limited time only, a condition to prevent the alienation may be imposed. In order, however, to restrain the assignment which the law itself makes, a series of cases has established this rule, that the grantor must expressly declare that the annuity shall wholly cease or go over, on the happening of the event from which the legal assignment arises, otherwise it will pass to the assignee.

Thus A. by his will gave an annuity to B. directing that B.'s receipt only should be a discharge for it, that B. should not alienate, and that if he did it should cease and determine. B. became a bankrupt, and the commissioners

(a) *Maydes v. Little*, 2 Vern. 194.

(b) *E. p. Coysgarne*, 1 Atk. 193.

(c) *Pryor v. Hill*, 4 B. C. C. 138; *Clancy's R. of Marr. W.* 477.

having assigned it to his assignees, it was held that the annuity ceased.(a)

Again, a testator bequeathed his property to trustees, on trust to pay an annuity into the hands of his nephew, and *not to his assigns*, for his own sole use and benefit; provided, that if the nephew should by any ways or means whatever, sell, dispose of, or incumber the right, benefit, or advantage he might have by the will, the annuity should cease as to him, and be payable to his children. The nephew having become bankrupt, the Vice Chancellor, construing the proviso with reference to the mode of payment, held that the annuity ceased, and did not pass to his assignees. He interpreted the testator's meaning to be, that when the rents and profits could no longer be paid into the hands of the nephew for his own use and benefit, according to his previous directions, then such right or benefit should cease.(b)

In *Shée v. Hale*,(c) an annuity was bequeathed with a condition, that it should fall into the residue upon the grantor's signing any instrument agreeing to sell, assign, charge, or dispose of, or empower any person to receive the same, or any part thereof. The grantor took the benefit of an insolvent debtor's act, and inserted this annuity in his schedule. It was held that the condition was broken, and the annuity determined. Perhaps, under the provision above referred to in those acts, it might now be preserved.

But as this condition thus works a forfeiture, the Courts have been strict in their construction of it as appears from *K. v. Robinson*.(d) There a lady devised an annuity to her son for his life, as an unalienable provision for his personal use and support, with a condition that if he should sell, assign, transfer, make over, demise, mortgage, charge, or otherwise attempt to alienate, or should do and execute any act, deed, matter, or thing what-

(a) *Dommett v. Bedford*, 6 T. R. 684; 3 Ves. 149.

(b) *Cooper v. Wyatt*, 5 Madd. 482.

(c) 13 Ves. 404. See also *Yarnold v. Moorhouse*, 1 Russ. & M. 364.

(d) *Wight*, 386.

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ever to charge, alienate, or affect the said annuity, it should cease. The grantor being involved in debt went abroad, and was sued to outlawry by a creditor in England. The Court of Exchequer decided that the annuity was not forfeited, and therefore might be taken on the outlawry. That to create a forfeiture here, some positive act was required on the part of the grantee, which outlawry was not.

And in *Wilkinson v. Wilkinson*,^(a) the annuity was to cease as to the grantee, and go over on alienation, but the question was raised whether there was a sufficient alienation. The condition of the gift was, "in case my son shall assign or dispose of, or otherwise charge or incumber the annuity so made to and for him during his life, as aforesaid, so as not to be entitled to the personal receipt, use, and enjoyment thereof, then the annuity of him, or his heirs so doing or attempting to do, shall from thenceforth cease." The grantee became bankrupt, and it was contended that this was an alienation as in the case of *Dommett v. Bedford*. But the Master of the Rolls considered that, as bankruptcy was not an alienation within the meaning of a restraint against alienation, it being an assignment by operation of law, there was not a forfeiture of the condition.

So, in a late case, bankruptcy was held not to be an alienation when the condition was that the estate should not be subject to alienation or disposition by sale, mortgage, or by anticipation of the receipt, and in case of any charge or attempt to charge; affect, or incumber the same, any such mortgage, sale, or other disposition or incumbrance should be a complete forfeiture of the annuity, and the same should go over and devolve upon the party next in succession.^(b)

In these cases the grantor had directed that the annuity should be forfeited, but in the following, where there was no such provision accompanying the condition against

(a) *Coop.* 259; 2 *Wils. C. R.* 47.

(b) *Lear v. Leggett*, 2 *Sim.* 479; 1 *Russ. & M.* 690.

alienation, the annuity passed to the legal assignee. In *Brandon v. Robinson*, (a) a testator had directed that his estate should be invested in the public funds in the names of trustees, who were to pay the dividends into his son's hands, or to his order, and on his receipt; to the intent that they should not be grantable, transferable, or otherwise assignable by way of anticipation; and on his decease the principal to be paid to such persons as would be entitled in a course of administration. It was decided, that on the bankruptcy of the son, his assignees under the commission were entitled to his life interest. "To prevent," said the Lord Chancellor, "the assignment and transfer to the assignee under the commission of bankrupt, it must be given to some one else." Again, in a subsequent case of *Graves v. Dolphin*, (b) a testator bequeathed an annuity to A. for his personal maintenance and support, and not to be liable to his debts, and to be paid from time to time into his own proper hands, and not to any other person, and his receipt only was to be a proper discharge. The Vice Chancellor held that the annuity passed to A.'s assignees on his bankruptcy. He said, "The testator might, if he had thought proper, have made the annuity determinable by the bankruptcy of his son, but the policy of the law will not permit property to be so limited that it should continue in the enjoyment of the bankrupt notwithstanding his bankruptcy. See also *Green v. Spicer*." (c)

Not only may the grantor impose a condition against alienation in express words, but the law itself will sometimes imply such a condition, from the nature of the consideration of the grant. The opinion of Catesby has been already mentioned, (d) in which he states that an annuity granted as a retainer for counsel and advice, is not assignable. And in general it seems, that where the assignee cannot fulfil the terms of the consideration, or where an assignment would be inconsistent therewith, this condition of non-assignment is implied; as in all cases where the

Condition
against aliena-
tion may be
sometimes im-
plied.

(a) 18 Ves. 429; 1 Rose, 197.

(c) 1 Russ. & M. 295.

(b) 1 Sim. 66.

(d) P. 25.

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annuity is granted for the render of personal services and attention, it is not assignable. And this rule applies as well to assignments by operation of law, as by the act of the party. Hence it was held that an annuity *pro consilio impendendo* was not forfeited to the crown on the attainder of the grantee for treason. (a) Neither can such an annuity be taken in execution. (b) And where an office is granted to which a rent is incident, as the office is not forfeitable to the crown on the treason of the grantee, so also the rent is not. (c)

May be waived
by the parties.

Since, however, the parties may vary the rights which the law will create for them, they may, by express words, waive this condition, where the law does not prohibit such waiver; and, therefore, it was determined that the grant of a rent to one and his assigns, *pro consilio impendendo*, was assignable, by the introduction of the words "assigns." (d) This was the case of a rent; it must not be taken as an authority to prove that an annuity with those words would be so likewise.

It is obvious that this condition is not to be implied where the annuity is granted in compensation of past services, and not in retainer of future assistance.

Public pensions
and salaries
how far assign-
able.

Besides private annuities, in which the grantor expressly or the law impliedly, restrains the assignment, the same principles operate in those public annuities granted by the crown or the legislature in the names of salaries and pensions. Here in part the common law applies, and in part some regulations have been made by the legislature. Lord Eldon has thus expressed the general rule in *Davis v. the Duke of Marlborough*. (e) "A pension for past services may be alienated, but a pension for supporting the grantee in the performance of future duties is not assignable." And the Vice Chancellor has stated in *Clay v. St. John*. (f) "A person entitled to a pension during pleasure may, if he pleases, sell not only that pension, but any future pension

(a) *Oliver v. Emsoune*, Dyer, 1.

(b) *Dyer*, 7.

(c) *Sir H. Nevil's C. Plowd.* 377.

(d) *Maund's C.* 7. Co. 28.

(e) 1 Swa. 79.

(f) 2 S. & S. 36.

granted in the consideration of the same motive." Acting upon this general principle, Lord Manners decided that, when a compensation pension had been granted by the crown to Lord Westmeath and his assigns, and he had assigned it, it was attachable for a debt due from the grantee. (a) It is observable, however, that the pension here was made payable to the grantee and *his assigns*: but where a pension was settled by the legislature on the Duke of Marlborough and his posterity, to be paid to the person entitled according to the limitation contained in an act of parliament, Lord Eldon refused to appoint a receiver for the benefit of an assignee. (b)

On reference to statutes by which annuities are granted by way of compensation, it appears that they are not granted to assigns; (c) it may be very questionable whether they have the power, which it has been contended annuities in general have not, and may be alienated. In a case in Croke James, 78, (d) the queen had granted under her great seal, to one Allen, an annuity of 40*l.* for 21 years, to be paid by the receiver of her Court of Wards. This annuity was taken by the sheriff on a *fi. fa.* against Allen, and sold. The validity of the extent and sale was questioned; but the Court of Judges held that it was well extendable; for, being an annuity certain for years certain, and payable by the receiver, it was in the nature of a rent charge for 21 years, and was well grantable over, and vendible, and not like an annuity, which chargeth the person only. It would be difficult to apply that reasoning to modern pensions, which are only charged upon the revenues of the country. See further the case of *Priddy v. Rose*, (e) where there was some discussion on this subject.

But in regard to the salaries and pensions attached to public offices, it is quite inconsistent with good policy that

(a) *Macarthy v. Goold*, 1 Ba. & Be. 387.

(b) *Davis v. Duke of Marlborough*, 1 Swa. 74.

(c) 7 & 8 Geo. IV. c. 51; 1 & 2 Will. IV. c. 56.

(d) *York v. Twine*.

(e) 3 Mer. 93.

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Assignment of
officers' pay,
half-pay and
pensions not
allowed.

any public functionary should diminish or deprive himself of those funds which are necessary for his support and maintenance, and the continuance of which can alone secure integrity in the discharge of his duties, and respect from others over whom he may probably have control or authority. They are, therefore, very properly not assignable. Occasion will occur hereafter to examine this subject still farther, when the nature of the property which can be charged to secure a grant is considered; yet here may well be noticed the matter which was formerly discussed at some length relative to the pay of officers in the army and navy.

It had been holden, that the half-pay was a species of recompense for services already performed, and therefore that it was assignable. (a) But the Court of King's Bench afterwards determined that this half-pay was not assignable, (b) which decision was supported, after a deliberate examination of all the authorities, by the Court of Exchequer, (c) on this ground, that it was a public grant, the intent of which was that it should not be assigned. As might naturally be expected, an officer's full pay, where of course he is in actual service, is subject to the same restraint. (d)

The determination of the Courts of law have been recognised and enforced by the legislature, which has also extended it farther than the principles of the common law would have warranted. By 11 Geo. IV. c. 20. s. 47, persons entitled to any marine half-pay, or to any allowance from the compassionate fund, to officer's widow's pensions, seamen's or marine's wages or half-pay, are restrained from assigning the same. By 7 Geo. IV. c. 16. s. 26, Chelsea pensioners, and by 10 Geo. IV. c. 26. s. 3, Greenwich out-pensioners are restrained from assigning their pensions. So by 7 & 8 Geo. IV. c. 53. s. 121, the salaries

(a) *Stuart v. Tucker*, 2 W. Bl. 1137.

(b) *Flarty v. Odium*, 3 T. R. 681; *Lidderdale v. D. of Montrose*, 4 T. R. 248.

(c) *Stone v. Lidderdale*, 2 Anst. 533.

(d) *Barwick v. Read*, 1 H. Bla. 627.

and superannuation pensions granted to officers and persons employed in the Excise are not assignable. And by the Insolvent Debtors' Acts, (a) the pay, half-pay, salary, emoluments, or pension of any officer in the army or navy, or any clerk or civil officer of his Majesty or the East India Company, cannot pass to the assignee of an insolvent debtor, but the Court may order such portion thereof as, on communication with the Secretary at War, or the Commissioners of the Admiralty, or the other head of the department to which the prisoner may belong, may be thought proper, to be paid to the assignee.

It is said by the Court, in the case of *Oliver v. Emsoune, Dyer 2*, that if a man be created duke, and for the maintenance of his dignity, the king grant to him an annuity of 20*l.*, he cannot grant this to another, for it is incident to his dignity. (b) Yet it would rather appear that there is no such implied condition, and that the alienation must be expressly restrained. In the case of the Duke of Marlborough, on whom and on whose posterity a pension was settled by parliament, for the better and more honourable support of the dukedom, Lord Eldon refused to restrain an assignment made by a descendant of that duke, when this objection was pressed upon his notice. (c) And in the annuities granted in modern times for public services, and in support of the dignities confined upon eminent men, (d) a clause has been usually inserted which prohibits the grantee, or the person for the time being entitled thereto, from alienating for a greater estate than his own life; whence an inference arises, that without such a clause the annuity would be assignable, notwithstanding it is incident to the dignity.

Whether an annuity granted in support of a dignity be assignable.

Though a rent or perpetual annuity may be assigned, yet

(a) 53 Geo. III. c. 102. s. 27; 1 Geo. IV. c. 119. s. 28; 7 Geo. V. c. 57. s. 29.

(b) See Co. L. 83. b., n. 53.

(c) *Davis v. D. of Marlborough*, 2 Swa. 76.

(d) See 48 Geo. III. c. 13; 50 Geo. III. c. 63; 54 Geo. III. c. 161.

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the arrears which may be due at any time cannot be legally granted over. (a)

These are the observations which it has been deemed necessary to make upon this important property of annuities, namely, their assignable quality. There only remains one other property to be mentioned.

A rent is divisible.

As a rent is assignable, it is also divisible; although Popham, J. in a case (b) which came before the Court, pointed out an inconvenience that may arise from the tenant being subjected to several distresses instead of one, yet the other judges decided against him. This, too, in the case of a devise. Subsequently, in *Colburn v. Wright*, (c) a rent was devised to three persons, as tenants in common, and they conveyed their portions by fine to uses, and the whole rent again vested in one person. It was objected that this division of the rent was invalid without the tenant's attornment. But it was answered, that the devise and the fine to uses did not require the tenant's assent or attornment; and the Court held the rent to have been divided properly. Since the statute of 4 Anne, c. 16, the attornment of the tenant, which was previously required on the division of the rent, (d) is rendered unnecessary, though notice of the division must be given to him.

A rent may also be divided by the act of the law, as it was holden that, on a writ of execution against the grantor, the sheriff could take two-thirds of the rent, for this, it was said, was a separation by the law and not by the parties. (e)

(a) *Williams v. Munnington*, Ray, 200; 1 Ventr. 108; 2 Keb. 693, 739; Jenk. Cent. 236, cited by Bosanquet, J. in *Mirehouse v. Rennel*, 8 Bing. 494.

(b) *Ards v. Watkin*, Cro. E. 637, 651; Moore, 649.

(c) 2 Lev. 239.

(d) Co. L. 148. a.; Hob. 25.

(e) *Wotton v. Shirt*, Cro. El. 742.

CHAPTER II.

OF THE PARTIES.

BEFORE adverting to the form of the transaction, or the instruments by which it may be evidenced, conveyed, and secured, it will be more in order to consider the parties to the contract.

It may be stated, generally, that all persons who have capacity to execute any deed may be the grantors of annuities, whether such persons be politic or natural. With regard to corporations, there seems to be no restraint upon their granting annuities, if they do not charge funds which they hold merely as trustees, and do not fall within the restraining statutes, which will be stated hereafter. It must be noticed, however, that by the late act, 2 & 3 Will. IV. c. 69, municipal corporations are prohibited from spending or charging the corporation funds for any parliamentary election purposes. The king, indeed, cannot now create a rent so as to be a charge upon the crown lands, although formerly his power over them was unrestricted; (a) but, as to annuities, he may grant any pensions, so that he do not exceed the amount of his revenue settled by the civil list. As, however, the king cannot be personally responsible, he must specify in his grant who is to pay the annuity, otherwise it will be of no avail. (b) While there are various pensions which the legislature have authorised the crown to grant to officers of the crown on their retirement, and which are charged upon the consolidated fund of the kingdom.

The government also, as was observed in the introductory essay, grants annuities through the instrumentality of certain commissioners, in the form and under the regulations appointed by Act of Parliament, 10 Geo. IV. c. 24.

(a) Com. Dig. Prerogative, D. 88.

(b) F. N. B. 152; Salk. 58; Dyer, 92, b.

CHAP. II.
THE PARTIES,
GRANTORS.

Certain communities empowered to grant annuities.

Certain communities have been incorporated, either by the legislature or the king's charter, for the express purpose of granting annuities, of which common instances occur in the public insurance and annuity companies. And there are many private associations of individuals who have combined, according to various rules and regulations, mutually to grant or secure annuities to themselves or their relatives.

Local trustees.

A power to grant annuities for the loan of money is usually inserted in most Acts of Parliament passed for the creation of turnpike trusts, or for the making of canals or docks, or for similar local purposes; and in some instances the terms on which the annuity shall be granted are expressly limited, to prevent any improper or extravagant loans.(a)

Churchwardens and overseers of a parish.

The statute 59 Geo. III. c. 12. s. 15. has also conferred a power upon churchwardens and overseers of a parish, who are not otherwise a corporate body, to grant annuities for parochial purposes. So by 3 Geo. IV. c. 72. s. 6. churchwardens and chapelwardens may grant annuities in order to raise money for the building and repairing of churches.

Churchwardens and chapelwardens.

Where an Act of Parliament authorizes the raising a sum of money by annuities, care must be taken not to exceed that sum, for the Courts are strict in their construction of the authority, and will not sanction any rates which may be imposed for the payment of the whole sum, a part of which exceeds that, the raising of which is authorized, since not only is the rate bad for the excess, but where it is general it is bad for the whole.(b) If the rate can be any way severed, so that there appears to be a distinct rate for the excess, then it seems that that only would be bad, and the other might be supported.

The restrictions above referred to, as imposed upon ecclesiastical and collegiate corporations, prevent them from

(a) See Wilde, Supp. to Bart. Con. vol. iii. p. 96.

(b) Richter v. Hughes, 2 B. & C. 499.

charging their possessions, and will be considered more at length in a subsequent chapter. But it seems not altogether out of place to notice here, that where a society or company is formed upon the plan of raising a fund by annual or other subscriptions, out of which annuities are to be paid to themselves, after a certain age, or to the widows or children of the subscribers, on their death, or on any other contingency, the members become trustees of the fund so raised, for the benefit of the different claimants, and will not be allowed to dissolve the society, and distribute the collected funds, if there be any persons entitled to the payment of annuities, under the covenants or regulations of the society. The claimants have a vested interest in the fund, which will be protected by a Court of Equity, though through miscalculation or error in the formation of the association, the subscriptions become insufficient for the payments, according to the original proposition. Probably the existing subscribers may withdraw, and abandon their contingent interest in the fund, and thus relieve themselves from their liabilities; but this will depend upon the terms of the covenants which they have entered into. These observations were deduced from a case (a) which occurred in Ireland before the Court of Exchequer, where an application was made with success by the widows of the members of an annuity company in that kingdom, to restrain the surviving members from dissolving the society and dividing the funds. In this country there have been some cases (b) which establish that the company cannot dissolve itself, so as to defeat the claims which arise under the original engagement. But on an application to a Court of Equity, an inquiry will be there instituted as to the state of the association, as to the correctness of its constitution, and whether its object may be effected by any reasonable modification of the plan, either in the increase of the subscription, or in the diminution of the annuities; and there will be a decree for that

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Associations cannot dissolve themselves and divide funds, so as to disappoint existing claimants.

(a) *Cartland v. Lyster*, Ridg. Lapp. and Lef. R. 280.

(b) *Pearse v. Piper*, 17 Ves. 1; *Buckley v. Cater*, ib. cit. *Reeve v. Perkins*, 2 J. & W. 390.

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which may be the result of the inquiry. Should it be found impossible to sustain the society, the Court will make such a distribution of the funds yet remaining as under the circumstances of each particular case may be adjudged advisable and equitable between all the parties. It is manifest, therefore, that the members of the society will generally act most prudently by referring their disputes in the first instance to some actuary or person conversant with the details of such subjects, as that will ultimately be the result of any application to a Court of Equity.

Natural and
individual persons.

Exceptions.

1. Married women.

Referring now to natural persons and individual grantors, it will be found that they stand, for the most part, in the same situation as the makers of other contracts, and are subject to the same exceptions. The first exception that may be mentioned, is that of married women. The law recognizes no property in them, and therefore their grants are void. It is expressly stated in Perkins (a) that if a feme covert grant an annuity by deed, this grant is void. But though the husband is entitled to the enjoyment of his wife's real estate during his life, yet she has so far a power over it, that she can join with him in the grant of a rent by means of a fine or recovery, which shall charge her lands. Any grant by herself without her husband's knowledge and assent, or in her own name alone, though with his assent, will be void. (b). It matters not that the husband be abroad, so that his existence is uncertain: if in fact he be alive, the grant cannot be supported; in corroboration of which may be mentioned a late case (c) in the Common Pleas. A rent charge payable to a feme covert for her life was sold for a valuable consideration by herself and her husband, who received the purchase money, and both executed the deed of conveyance. The husband was separated from his wife, and she was ignorant where he was to be found, though she had made diligent search for him. On an application that the wife might be allowed to levy a fine of the rent charge without her husband, the Court refused to interfere.

(a) Grants, s. 6.

(c) E. p. St. George, 8 Taun. 590; 2 Mo. 652.

(b) Ib.

And it was also holden that if, on a separation, certain lands be assigned to her by her husband, she cannot in her own name grant a rent thereout. (a) If, however, she grant a rent out of her own lands, by fine, as a sole woman, and her husband and herself do not reverse it during the coverture, she will be bound by the grant after his death. (b) There does not appear any authority for carrying this position to the case of a mere deed by her as a feme sole, without the fine.

Her husband can only bind the land during his life, unless she join him in a fine or recovery; yet if he survive, and her interest, whether in the estate or in chattels real, vest in him, the charge will be valid against him so far as that interest extends. (c)

Husband bound if he survive.

Although a married woman cannot thus alone make a legal grant, she may through the exercise of powers, where any such have been given, create such charges, if the authority given to her be duly pursued; for she is considered merely as the agent or attorney of the party who created the power, and her charge is, as it were, that party's disposition. (d)

Married women may grant by means of powers.

A Court of Equity, however, acknowledges the separate property of a married woman, and accordingly her contracts are there enforced. Therefore, where property is conveyed to her separate use, she has the full disposition of it, and may grant an annuity, which shall be a charge thereon. Thus where property is conveyed to trustees to pay the annual produce to a married woman, to her separate use, or into her hands alone, she may assign the same as a security for the grant of an annuity. In one case, (e) indeed, Lord Rosslyn refused to enforce the wife's grant of an annuity secured on her separate estate, because he doubted whether she could give such security, and because her trustee had given notice to the purchaser of the annuity that he would not consent to it. But that case is wholly

Wife's grant may be valid in a Court of Equity.

(a) Perk. Grants, s. 8.

(d) Sugd. Powers, 156.

(b) Ib. s. 20.

(e) Mores v. Haish, 5 Ves. 692.

(c) 1 Pres. Ab. 343; Co. L. 184: b.

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at variance with all the later authorities, which have established the wife's full power over her separate estate, and was carefully examined by Sir W. Grant, in a subsequent case of *Essex v. Atkins*,^(a) when that learned judge controverted the positions of Lord Rosslyn, and decided contrary thereto, holding that the married woman having free control over her separate estate, might charge it with an annuity, and if the assent of her trustee was not required to her disposition thereof, his dissent was of no consequence.

In *Wagstaffe v. Smith*, and *Power v. Bailey*, there was no objection made by the trustee, and the annuity granted by the wife was in both cases supported. In the former, ^(b) certain bank annuities were limited in trust to permit a married woman to take the dividends to her own use for life, independent of her husband. In consideration of a sum of money paid to herself and her husband, she assigned these dividends to a trustee to secure the grant of an annuity, and the grant was established. Again, in *Power v. Bailey*, ^(c) previous to a marriage, it was agreed by articles of settlement, that the wife's separate estate should be vested in trustees for her sole and separate use, and that she should have full dominion and control over it. She granted, with the privity of her husband, an annuity to a young lady who lived with her, and charged her estate with it. It was held by Lord Manners, after her marriage with a second husband, to be a specific lien upon her separate estate so agreed to be settled upon her.

And in the last case ^(d) a testator devised a freehold estate to trustees, to pay the rents, as they became due, into the hands of his wife, and not otherwise, for her life, to her separate use, and not to be subject to the control of any future husband, and directed that the receipts of his wife alone, for what should be actually paid into her own

^(a) 14 Ves. 542. See also *Brown v. Like*, ib. 302.

^(b) 9 Ves. 520.

^(c) 1 Ba. & Be. 49.

^(d) *Acton v. White*, 1 S. & S. 429.

proper hands, should be good discharges. The Vice Chancellor decided that this was no restraint upon her power of alienation. He said, "It is now too late to contend that a lady is restrained from the power of alienating her life interest, because it is given to her sole and separate use, and is to be paid into her own proper hands, and upon her receipt alone. The contrary is settled by repeated authorities."

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It is manifest that it is often very desirable to restrain a married woman from disposing of her separate estate, and especially from charging it with an annuity. It was indeed held, that if she had not the power of disposing of it, she could not grant an annuity out of it; (a) and this has given rise to the clause, not now uncommon, which imposes a restriction upon a married woman's alienating her separate estate, by way of anticipation of the future accruing payments. This clause was at first open to some doubt as to its legality, but it is now established as perfectly valid. (b) It has also been the opinion of Lord Eldon, that where a married woman is possessed of a separate estate under a power, which also restrains her alienation, even a fraudulent concealment by her of this restriction will not give validity to the charge, since it is entirely a question of intention in the settlor, which her conduct cannot affect. However, in the case (c) before him the fraud was not proved, and he was not called upon to give an absolute decision.

Power of alienation by way of anticipation may be restrained.

Generally this restriction is contained in an express declaration, though it may be inferred from the circumstances and terms of the gift, as appears from *Caverley v. Dudley*. (d) There a testator bequeathed property to trustees to pay the produce to Lady D. for her life, and after her death to her children. Lady D. charged this with an annuity irredeemable. Lord Hardwicke held, that though there were no words restraining her from raising money by anticipation, that that was evidently intended, and therefore though she

Which restriction may be implied.

(a) *Hovey v. Blakeman*, 9 Ves. 525, cit.

(b) 2 Rop. H. & W. p. 230.

(c) *Jackson v. Hobhouse*, 2 Mer. 483.

(d) 3 Atk. 541.

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2. Minors, their
grants are void
or voidable at
common law.

might contract for a loan, yet an annuity for her own life was not warranted. Accordingly he directed that she might redeem the annuity, which should cease from the filing of the bill for redemption. The evidence of the intent to restrain the alienation is not very apparent, but the principle is admitted and acted upon by the Chancellor.

The next exception applies to minors. It is not quite settled whether the grant of a rent by a minor, at common law, was absolutely void, or only voidable. In *Perkins* (a) it is said, that if the grantee of a rent, granted by an infant, distrain on the land, the infant may punish him as a trespasser, but cannot plead that he did not grant by the deed, for it is not void, but voidable. And in *Bacon's Abrid. Infancy*, p. 139, a case of *Hudson v. Jones* is cited, where it was held that an infant's grant of a rent charge is not absolutely void, but voidable only. On the other hand, Lord Holt has said, in *Thompson v. Leach*, (b) that an infant's grant of a rent charge is not voidable, but ipso facto void, for if the grantee should distrain, the infant may have an action of trespass against him. Thus he adopts the reasoning of *Perkins*, but not the whole of his position, and there are other authorities (c) which also treat the infant's grant as void; yet there is no doubt that an infant, when he came of age, could confirm such a grant, and it is difficult to understand how a void instrument can be confirmed.

But void since
17 Geo. III.
c. 26. s. 6.
53 Geo. III.
c. 141. s. 8.

But in many cases, this doubt is of little, if any, consequence, because, as minors are persons particularly exposed to fraud when pecuniary annuities are granted, the legislature has provided a remedy in the statutes, which will require much attention in this treatise, the 17 Geo. III. c. 26. s. 6, and the 53 Geo. III. c. 141. s. 8, whereby it is enacted, "That all contracts for the purchase of any annuity or rent charge with any person being under the age of twenty-one years, shall be and remain utterly void, any attempt to confirm the same after such person shall have attained the age of

(a) Grants, s. 12.

(b) 3 Mod. 310.

(c) Com. D. *Enfant*, 1 Prest. Abs. 324.

twenty-one years notwithstanding." And farther more effectually to prevent such transactions, the statutes go on to enact, "That if any person shall, either in person, by letter, agent, or otherwise, procure, engage, solicit, or ask, any person, being under the age of twenty-one years, to grant or attempt to grant any annuity or rent charge, or to execute any bond, deed, or other instrument for securing the same, or shall advance or procure, or treat for any money to be advanced to any person under the age of twenty-one years, upon consideration of any annuity or rent charge to be secured or granted by such infant after he or she shall have attained his or her age of twenty-one years, or shall induce or solicit or procure any infant upon any treaty or transaction for money advanced, or to be advanced, to make oath, or to give his or her words of honour or solemn promise, that he or she will not plead infancy, or make any other defence against the demand of any such annuity or rent charge, or for the repayment of the money advanced to him or her, when under age, or that when he or she comes of age he or she will confirm or ratify, or in any way substantiate such annuity or rent charge, every such person shall be guilty of a misdemeanour, and being thereof lawfully convicted in any Court of Assize, Oyer and Terminer or General Gaol Delivery, shall and may be punished for the said offence by fine, imprisonment, or other corporal punishment as the Court shall think fit to award."

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There does not appear to have been any prosecution under this section, but in a case which came before the Court of Common Pleas, Dallas, C. J. stated that an attorney who knowingly raised money for an infant by way of annuity, though he was himself the nominal grantor, was guilty of a misdemeanour. (a)

These statutes repeal so much of the common law as allowed the confirmation of the contract for the sale of a pecuniary annuity, and are confined to the protection of

They are confined to the minor, and do not affect third parties jointly liable.

(a) *Mence v. Hammond*, 6 Moo. 494.

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the minor only. Accordingly it was decided (a) that the separate covenant of one grantor of an annuity was not avoided by the infancy of another, who had granted in the same deed both jointly and severally. It was not contended that the infant's deed was void at common law, but the defendant relied upon the section of these acts, which had rendered it invalid. However, Mansfield, C. J. observed, that "the statute does not say simply that the contract shall be utterly void, but void notwithstanding any attempt to confirm the same after the infant shall have attained the age of twenty-one years, so that the legislature was aware that the contract made by the infant was void at common law." But it is certainly open to doubt whether the statutes warrant that inference.

How the acts
are restricted.

These statutes, as will also appear hereafter, are restricted to the purchase and sale of annuities for pecuniary consideration, and do not apply to voluntary grants of annuities, or to those granted by testament, or secured upon real property, or property in the funds of equal or greater annual value.

Not confined to
life annuities in
this respect.

It is observable, also, that the other provisions of the annuity acts are confined to life annuities, whereas the language in these sections being more general, namely, *all* contracts for the purchase of *any* annuity or rent charge, they do not seem to be so restricted, but to extend to grants for term of years, or in fee.

Infant's devise
and testament.

Hitherto only grants by infants, by deed, have been considered; but it must not be forgotten that the statute of wills, 34 Hen. VIII. c. 5, which authorizes the devise of rents, prohibits a party under twenty-one from devising at all; therefore an infant cannot devise a rent charge. But an annuity being merely personal estate, may be bequeathed as early as he can make a testament, which is at fourteen.

3. Persons
attainted cannot
grant as against
the Crown.

Another exception is of persons attainted. After attainder for treason or felony, the party attainted is incapable of making a grant of a rent which shall charge the lands as

(a) Haw v. Ogle, 4 Taun. 10.

against the king, or the Lord to whom they may escheat, and as his personal property becomes forfeited to the king, the grant of an annuity will also be invalid, as against the Crown, or the Crown's grantee. But in either case, the attainted person, and all claiming through or under him, will be bound by the grant.(a)

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A pardon will restore to an attainted person his capacity of acquiring and charging his subsequently acquired property; therefore the grant of a rent out of lands purchased or descended since the pardon, or of an annuity after that act, will be valid even against the Crown. The pardon, to be available, must formerly have been granted under the great seal, but now, by the 6 Geo. IV. c. 25, it is provided that, in the case of free pardons, the prisoner's discharge and the performance of the condition, in the case of a conditional pardon, shall have the effect of a pardon under the great seal.

A grant after a
pardon will be
valid.

Again, a person absolutely destitute of understanding cannot execute a valid grant, for an idiot's grant is void. But where a man, originally sane, becomes a lunatic, and then makes a grant, although he cannot avoid it himself by alleging his incapacity in Court, yet it is now allowed that in all cases where he can plead *Non est factum*, he may give in evidence that he was a lunatic at the time of its execution, and therefore that the deed is void.(b) He may also prove that the grantee availed himself of his mental infirmity to practise fraud or deception upon him, and thus also avoid the grant, as in other cases of fraud.(c)

3. Idiots and
lunatics.

Although a party cannot himself plead his own lunacy or insanity, so as to avoid the grant, yet after his death his heir or personal representative may, and the grant will be void as against him.(d) It is, indeed, stated, that no person can avoid it during the grantor's life,(e) but it may be doubted whether this general position is supported by legal principles.

(a) 1 Perk. Grants, s. 26.

(d) Perk. Grants, s. 21.

(b) 2 Stark. Evid. Deed.

(e) Ib.

(c) Browne v. Joddrell, 1 M. & M. 105.

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Relief in Chan-
cery on com-
mission.

In Chancery, if a man be found a lunatic, on a commission, all his acts done since the time when his lunacy is found to have commenced, are invalidated, and any grant of a rent or annuity would be void, unless, indeed, the insane person have a lucid interval, when he may execute a grant which will be valid, though he should be subsequently found, on an inquisition, to have been a lunatic at a time prior to the grant. It is a question of fact, which will probably be sent as an issue for a jury to determine, whether the party, when he executed the grant, were sufficiently sane to understand the nature of the act he was doing. The reader will find in Colkinson on Lunacy^(a) the account of a trial before Lord Ellenborough, to try the validity of a grant of an annuity by a lunatic during a lucid interval, in which the grant was established.

Equitable relief may also be sought where the grant has been fraudulently obtained from one labouring under permanent or temporary mental imbecility. Such relief would be granted to the representatives of the grantor, and probably to himself, though there should be no commission of lunacy.

4. Grants by insolvents and bankrupts are void as against creditors.

Here; also, may be noticed certain incapacities, which affect persons who are insolvent, and render their acts to a certain extent void. By the statute 13 Eliz. c. 5, perpetuated by 29 Eliz. c. 5, all grants of property, and rents among the rest, are declared void as against the grantor's creditors, unless the grantee gave a good consideration; and had no notice of the grantor's intended collusion. And by the statute 27 Eliz. c. 4, perpetuated by 39 Eliz. c. 16, grants made to defraud subsequent purchasers, are declared void as against them, unless granted to persons who have bona fide given good consideration. These acts, however, expressly confine the avoidance to the parties defrauded, and to those claiming under them.

Again, by the bankrupt act, 6 Geo. IV. c. 16. s. 73, "if any bankrupt, being insolvent, shall, upon the marriage

(a) Faulder v. Silk, p. 390.

of any of his children, or for some valuable consideration, have conveyed, assigned, or transferred to any of his children, or other person, any hereditaments, fees, offices, or annuities, the commissioners have power to dispose of the same, and such sale will be valid as against the bankrupt and all claiming under him," so that a trader, subject to the bankrupt laws, if insolvent, cannot assign or convey any annuity so as to vest the property therein in any person, even for a valuable consideration, if he afterwards be declared a bankrupt. And as to his granting an annuity or rent, besides the statutes of Elizabeth, which would apply in some cases, it is also enacted by the 6 Geo. IV. c. 16. s. 81, that all conveyances by, and all contracts and other dealings with any bankrupt, bona fide made and entered into more than two calendar months before the date and issuing of the commission against him, shall be valid, notwithstanding a previous act of bankruptcy, provided the person so dealing with the bankrupt had not notice of any previous act of bankruptcy. Therefore, any grant of an annuity by a bankrupt, though for a valuable consideration, after an act of bankruptcy, but within two calendar months from the date of the commission, will be void.

Lastly, by 1 Will. IV. c. 47, re-enacting 3 & 4 Will. III. c. 14, all wills and testaments whereby rents or other real property are devised, which would be liable to the discharge of the devisor's or testator's debts, are declared void as against the creditors entitled to charge the same. The prohibition created by these statutes would not be avoided by any instrument which is really testamentary, though in language and appearance it is a deed inter vivos.^(a)

It is not proposed to discuss the various decisions upon these statutes, though some observations will be made upon them in a subsequent part of the treatise.

It is now to be considered who may be the grantees of a

(a) Peacock v. Monk, 1 Ves. S. 127.

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Who may be
grantees of rents
and annuities.

1. Corporations.

rent or annuity. Here also the general proposition equally applies, that all persons have the capacity of taking, subject to the qualifications which arise in certain instances. Thus attending first, as before, to corporate persons; they have the power to take grants of annuities, or rents under the limitations imposed by the statutes of mortmain. Whatever may have been their power at common law, it is well known that, from very early times, corporations have been prevented from taking to hold any land or tenements in fee, without the Crown's licence. A distinction accordingly prevailed between a rent and an annuity, the former being treated as realty, and therefore a subject of mortmain, the latter as personalty, and therefore not falling under the prohibition. (a) A rent not being the subject of tenure, did not like land escheat to the lord, but was forfeited at once to the Crown. But a licence to hold was grantable by the king after the execution of a writ *ad quod damnum*, which satisfied him that no injury would ensue to him or any other person from the grant; (b) although a practice prevailed of obtaining the licence without the necessity of the writ. Some doubts existed as to the legality of the king's licence, especially after the dispensing power claimed by James II. had been expressly abolished. Accordingly, the statute 7 & 8 Will. III. c. 37, was passed, which authorized the king to grant licence to a corporate body to take and hold rents in perpetuity or otherwise, free from forfeiture. Again, however, restraints were imposed upon the taking of grants under devises by corporations. By the statute of wills, devises to corporate bodies were excepted, though the statute 43 Eliz. c. 4. authorized the devise for charitable uses. Much mischief, however, was found to arise from this latter act, and, to prevent it, the statute 9 Geo. II. c. 36. was passed, which has rendered void the grant or conveyance of any rent or tenement, or of money or stock, &c. to be laid out in the purchase of any tenement or hereditament, to any body corporate, or otherwise for any charitable use

(a) Co. L. 2 b.

(b) Fitz. N. B. 222.

whatever, unless by deed executed twelve calendar months before the death of grantor, and enrolled in Chancery within six months after execution, to take effect immediately on the making thereof, and irrevocable. There is a proviso which exempts the universities, and the colleges of Eton, Winchester, and Westminster, from the operation of the act.

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Thus rents, or money given to purchase them, cannot be conveyed to bodies corporate without the king's licence, or unless the provisions of this act be complied with. But there is no restriction on the grant of a personal annuity. Where, however, real estate is bequeathed to purposes which render the devise void under this statute, and an annuity is also bequeathed to accompany and be dependant upon that devise, such bequest is invalid. As where certain houses were devised for the habitation of the poor of a parish, and the interest of stock in the funds was bequeathed to those who should inhabit them,^(a) and also where a chapel was to be built, and an annuity was to be paid to the minister therein^(b), in both cases the latter bequests were held to be void. An annuity, however, is not affected by a gift in the original conveyance of the fund charged to a charitable use after the death of the annuitant.^(c)

Rents granted
in mortmain are
void: annuities
are not;

except where
dependant upon
void devises.

It may be noticed that, when a rent void under this statute has been charged upon a particular estate, which is devised away, it sinks for the benefit of the devisee of the land; in the absence of all declaration by the devisor.^(d) But if there have been a general devise of the property, subject to the rent, it was the opinion of Lord Camden that the heir was entitled to the benefit of this charge, because there was an evident intention that the devisee should have the estate subject thereto, and this was carved out of it.^(a)

Without extending this inquiry farther, a case before Lord Hardwicke may be mentioned, where he held a bequest of a sum of money to be laid out in land for an

(a) *A. G. v. Goulding*, 2 B. C. C. 428.

(b) *Chapman v. Brown*, 6 Ves. 410.

(c) *Waite v. Webb*, 6 Madd. 71.

(d) *Baker v. Hall*, 12 Ves. 497.

(e) *Gravenor v. Hallam*, Amb. 642. See *Wright v. Row*, 1 B. C. C. 61.

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An unincorporated body cannot take as such.

annuity to a minister to preach an annual sermon, and keep a tombstone and inscription in repair, and to a corporation, for keeping an account thereof, to be void, as being for a charitable use. (a)

An unincorporated community, or body, cannot take grants otherwise than in the individual characters of the members, and if the persons be uncertain, the grant will be void. Thus the parishioners or inhabitants of a parish are too uncertain to be the grantees. (b) So churchwardens are only incorporated in law for the care of the church. Accordingly a rent granted to the churchwardens of a parish, to keep a family vault in repair, was held to be void at law by Lord Camden, though it would be a trust on the heir at law in equity. (c) But the statute 59 Geo. III. c. 12. s. 30, empowers the churchwardens and overseers of the poor of any parish to receive the assignment of the pension to which any pauper is entitled for services in the navy, royal marines, army, or ordnance. The ordinary mode of making grants for the benefit of a parish is to grant to a trustee, with directions to pay to the parish officers for the time being. Again, the legislature has enacted that the visitors of a lunatic asylum may take any interest in lands given them, notwithstanding the statutes of mortmain. (d) An inconvenience sometimes happened to parishes and public charities, from the trustees appointed to receive the annuities or rents dying without known heirs. This has been remedied by a very late act of parliament, 2 & 3 Will. IV. c. 57, which authorizes the Court of Chancery, after advertisements have been made in the Gazette and local newspapers, for the legal representative of the deceased trustee, without effect, to appoint a new one. And where the rent or annuity does not exceed 20*l.* per annum, any five of the Commissioners of Inquiry into Public Charities may empower the resident ministers and churchwardens or chapelwardens of the parishes or places interested, to receive the

(a) *Durour v. Motteux*, 1 Ves. S. 321. (c) *Gravenor v. Hallum*, Amb. 643.

(b) Co. L. 3. a.

(d) 9 Geo. IV. c. 40. s. 25.

same, until the trustee duly appointed appear, or be appointed by the Court of Chancery.

Turning now to individual grantees, some remarks will be necessary upon certain persons to whom annuities may be conveyed.

First, as to aliens. They by the law of England cannot hold real property to their own use; they may take it, indeed; the conveyance to them will not be void, but, on an inquisition and office found, it will vest in the Crown, (a) subject, however, to such distribution as the king in his discretion may think fit, under the authority of the statute 6 Geo. IV. c. 17. Hence a rent charge granted to an alien is forfeitable to the king.

But personal property may be held by an alien, while his country is in amity with Great Britain; he can, therefore, be the grantee of, and enforce, an annuity, which is personalty. In a time of war, all obligations between the inhabitants of an enemy's country and this cease, and cannot be enforced as against each other. (b) As, however, the property of alien enemies is seizable by the king, the bonds and obligations due to them may be taken by the Crown, and then it is said the king shall compel the debtor to pay them. Thus, if an alien be the grantee of an annuity, and a war be declared, the king may seize the security, and compel the grantor to pay him. Nevertheless, there must be a commission and inquisition to entitle the king, and a peace before the latter will discharge the cause of forfeiture. (c) It is probable that, on the return of peace, the grantee could claim all arrears accrued during the war, which had not been paid to the Crown.

Next as to married women. A married woman may be the grantee of an annuity, provided her husband do not disagree to the grant. It is not required that he should expressly assent to it, as in the case where she is the grantor, as mentioned before; it is sufficient if he do not

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2. Individual
grantees.

1. Aliens cannot
hold rents.

But can hold
annuities while
in amity.

2. Married
women may be
grantees.

(a) Co. L. 2b.

(b) Rolle Abr. Alien. 195. B.

(c) A. G. v. Weeden, Park. 267.

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But their annuities vest in their husbands.

dissent. (a) Either she or her heirs may waive the grant after her husband's death, without assigning any cause; but if she assent thereto, knowingly and freely, she and they will afterwards be bound.

Whether the grant be before or after marriage, it vests in the husband, and consequently passes to his assignees, as the other property of the wife, unless there be an express settlement thereof to her separate use, excluding his right. (b) But this proposition must be thus understood:—if it be a rent to which the wife is entitled, the husband will take the payments as they fall due, and are paid to her. Should there be any arrears at the death of the wife, he will be entitled thereto, either in his own name, or at least as her administrator. If she survive, she will be entitled to such arrears, both at law and in equity, unless there has been some agreement, on some nuptial consideration, to make the same part of the husband's estate. (c) If it continue after the wife's death, the husband may be tenant by the courtesy thereof during his life. As to an annuity secured by a deed of covenant, the husband has only a life interest therein, and can take it during his life, provided it last so long, and the marriage continue. On his wife's death, indeed, he will lose his marital right, and be entitled to it as her representative. He takes it, however, subject to all conditions or limitations which she may have imposed upon it. And therefore, where the wife was the grantee of an annuity, and, together with her husband, had agreed to release it for a certain sum, the husband was held bound to execute the release, though she died before it was executed. (d)

Where it remains a chose in action, unreduced into possession at her death, although in equity it is part of his property, yet in law it vests in her administrator. Consequently the husband, or at least any one claiming through

(a) Co. L. 3 a; Perk. Grants, s. 43.

(b) Caunt v. Ward, 7 Bing. 608; Fitzer v. Fitzer, 2 Atk. 511.

(c) Salway v. Salway, Amb. 692; Dick. 434.

(d) Risby v. Stafford, Palm. 313.

him, must obtain letters of administration of her estate before he can make any demand for it in a Court of law. (a)

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A wife's descendible annuity would, however, go to her heir on her decease, because, being personal property in its nature, there is no tenancy by the curtesy, and it is not such property as to vest in him by marital right, nor in his representative character. This is so stated in argument in the late case of *Naylor v. Winch*, (b) and if it be so, it is an anomaly arising from the anomalous nature of the property.

But it seems the wife's annuity vests in her if she survive, for it was held in *Thompson v. Butler*, (c) that the release by the husband of an annuity granted to his wife would not defeat her claim when she became a widow. Still less could a release by a husband of all demands and actions which he had, operate as a bar to his widow's claim to an annuity granted to commence on his death, for this, it was said, was a demand which he never could have. (d) Lord Hardwicke, (e) speaking, indeed, of a wife's rent, says, "This is the case of a freehold of a wife, and devised to her for life, and during the coverture the husband might have a legal remedy by distress for the arrears, but he could not have conveyed it away to her prejudice, for if she had survived she would have been entitled to the rent charge again."

Wife entitled to her annuity if she survive.

Where the annuity is secured by a bond, conditioned for its due payment, so long as it is duly paid, the bond not being broken, there is no cause of action, and therefore, if there be no breach during the husband's life, it seems that it will remain to the widow. But if broken before his death, it is a chose in action which he *may* reduce into possession, and if he do, the property in the bond, and thereby in the

The effect of the husband's reducing it into possession.

(a) *Betts v. Kimpton*, 2 B. & Ad. 273.

(b) 1 S. & S. 560.

(c) *Moore*, 523.

(d) *Belcher v. Hudson*, Cro. J. 228.

(e) In *Fitzer v. Fitzer*, 2 Atk. 514.

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annuity, it is thought, will vest in him; if he do not it will survive to her. If the bond be broken in the lifetime of the husband, and he recover a judgment upon it since the statute 8 & 9 W. & M. c. 11, he can only have a scire facias for the arrears as they fall due, so that in effect it corresponds with a covenant to pay an annuity. In this view it is probable that when the wife survives, though his personal representative must sue out process against the obligor, yet he will be a trustee for the wife, to whom the bond originally belonged. Certainly, as the condition will be to pay to her, if that be performed, it is difficult to see any means by which the money could be brought over so as to constitute any part of her husband's estate. It has been holden, indeed, that where a bond has been given conditioned to pay to a married woman, the obligee cannot assign a breach for non-payment to him. (a)

With reference to the husband's reducing the annuity into possession, it may be noticed, that where a wife became entitled to stock in the funds, and the only act of interference proved on the part of the husband was the signing orders for partial transfers with her, which ran in her name, the Master of the Rolls held that the stock survived to her, and had not been reduced into possession by her husband. (b)

As to a warrant of attorney to enter up judgment, which is a customary security on the grant of an annuity, if it be given to an unmarried woman, and judgment be not entered up previously, her marriage will not render it void, but the Court will allow it to be entered up in the names of herself and her husband, if required. If she be married, it cannot be given to her alone, but must be to her and her husband jointly, in which case it enures for the benefit of the survivor. (c) When it has been given to an unmarried woman, and judgment is entered up before the marriage; after that event, she and her husband must sue out a writ of scire

(a) *Lunn v. Payne*, 6 Taun. 140.

(b) *Wildman v. Wildman*, 9 Ves. 174.

(c) 2 Saund. 72, note k.

facias to entitle them to execution: should, however, the husband die before the writ is sued out, perhaps the best course would be for the widow to sue out such a writ, and recite therein the marriage and death of the husband, though no authority is found on this point. It is common to insert in warrants of attorney a waiver of the obligation to sue out a scire facias, which is intended to apply to the case where execution is sought after the lapse of a year. There is no decision in which it has been held that such a waiver would extend to the scire facias required on the marriage of the plaintiff. It may be prudent, therefore, to extend the terms of the instrument, when it is given to a woman, to this case.

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Hitherto it has been considered that the rent or annuity had been granted to a married woman alone; but if it be granted to her and her husband jointly, it follows the ordinary rule in all joint grants, and vests in the survivor, and also draws with it any arrears that may be due at the death. (a)

An annuity granted to husband and wife jointly vests in the survivor.

It is very common to exclude the husband from taking the annuity granted to the wife; but there must be clear and distinct language, otherwise the Courts will not hold him excluded. (b) Thus the appointment of trustees, and the direction to them to pay the annuity to the wife, will not be sufficient to prevent the husband's claim. Neither will directions to pay it to her use or to her own use. Whereas if the payments are to be made to her sole and separate use, or into her proper hands, or if her receipt is to be a sufficient discharge, the husband will be barred. (c)

The husband may be excluded by proper language.

Where the husband is not excluded, but the annuity is to be paid to the wife, she cannot without his consent make any arrangement by which the payments may be anticipated, even though it be for his actual benefit. As if the grantor be the husband's creditor, she has no authority to warrant

(a) *Brown v. Dunnery*, Hob. 208; *Brown & G.* 171.

(b) *Dakins v. Berisford*, 1 Ch. C. 194; *Caunt v. Ward*, 7 Bing. 608.

(c) See *Roper's H. & W. c. 18. s. 3*; *Clancey's R. of M. W. b. 3. c. 2.*

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3. Infants may be the grantees.

her in directing the payments to be retained in satisfaction of the debt (a).

Again, an infant may be the grantee, but he may waive the grant on his arriving at full age, without assigning any cause, and should he die under age, his heir may also waive it (b). But if he agree to it at maturity, it shall not afterwards be avoided except fraud can be shown.

4. Persons attainted may take but cannot hold.

If a man commit treason or any felony he may also be the grantee, but cannot hold the grant after attainder, for it then vests in the crown. (c) Since, however, a felon's right to hold property is restored on a pardon, this question may arise, whether an annuity secured by covenant is so destroyed by the grantee's subsequent attainder, that he can never again claim it. If the grantor pays the annuity up to the time of the felony or treason, no cause of action has then accrued, although the covenant for the future payments will vest in the crown, (d) and if the annuity be paid until the pardon be granted, no cause of action hath then accrued. The covenant being for the payment of the annuity as it becomes due, to the grantee, it should seem that after the pardon the crown has no right to the then accruing payments, and there is no personal incapacity in the grantee which prevents his suing.

When the annuity is secured by a bond, that may be forfeited by non-payment before the pardon, of course it will then vest in the crown, but should it not be so forfeited, it may seem in like manner that the pardoned felon would be entitled to enforce it.

5. Idiots or lunatics may be grantees.

So an idiot or person of non-sane memory may be the grantee of an annuity, and, as Lord Coke (e) says, cannot himself waive it. If a man of non-sane memory recovers his intellect, and freely and knowingly assent to it, it shall not be avoided by any one. Otherwise the heir of the lunatic, or idiot, may avoid the grant without any cause

(a) *Brown v. Benson*, 3 East, 331.

(b) Co. Lit. 2 b.

(c) Ibid. *Bullock v. Dodds*, 2 B. & A. 275. *Roberts v. Walker*, 1 Russ. & M. 752.

(d) *Noy*, 155.

(e) Co. Lit. 2 b.

shown. However, the reader is referred to the observations regarding lunatic grantors in page 49 above, which are equally applicable here.

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Lastly, since the repeal of the laws against Papists, there is no incapacity resulting from religious dissent, if the object of the gift or bequest be the maintenance of sectarian teachers. (a) Therefore in *Attorney General v. Cock*, (b) where a lady bequeathed a rent charge to the minister of the dissenting protestants called baptists, the Master of the Rolls deemed it to be valid.

6. Sectarian
preachers may
be grantees.

Besides the legal and absolute incapacities above considered, Courts of Equity have introduced additional restrictions upon the acts and contracts of persons standing in certain relations to each other. When the situation of two parties is such, that one holds a fiduciary confidence reposed in him for the benefit of the other, it may almost be said that in equity they cannot enter into contracts with each other, nor can the former receive any gift or gratuity from the latter. The grant of an annuity therefore between such parties will not be supported in these Courts. This incapacity has proceeded upon grounds of public policy, to which transactions between such persons are opposed. In regard to contracts it is the duty of every person filling a fiduciary character, necessarily arising from his office, to act for those whose interests are entrusted to him, as though he were acting for himself; he ought to exert all his ability, and contribute all his knowledge and information for their advantage. It will be very difficult for him to do so, even with the most honest intentions, in cases where his individual interest is concerned; and where his honesty is impeached, it will be impossible for the judge, before whom the transaction is questioned, to decide whether he has acted fairly towards his trust or not. In regard to acts of bounty, if they were to be allowed, too much opportunity would be given for the exercise of undue and improper influence in some cases, or of extortion and unauthorized

Equitable incapacities resulting from the confidential relationship of the parties.

(a) Beld. on Prot. Diss. 79.

(b) 2 Ves. sen. 273.

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controul in others. Hence it has long been established that such transactions cannot be supported in equity. Thus a guardian and his ward, parent and child, attorney and client, any trustee and the party whose interest is confided to him, cannot grant or receive annuities from each other. The rule applies indeed in all cases where the influence is created, or the confidence exists, although the party fills no expressly recognized character. As where a clergyman had induced a lady to entrust the management of her affairs to him, and obtained a conveyance of certain property from her, Lord Eldon vacated that conveyance, principally on the ground of the confidential relation in which he stood. (a) So also a deed obtained by the keeper of a lunatic asylum from a patient who was alleged to be recovered, was set aside. (b)

It will not be necessary to cite the various cases in which this principle has been acted upon, yet the following may be briefly noticed. In *Young v. Peachey*, (c) a father induced his child to suffer a recovery for a particular purpose, under pretence that he would be a trustee, and afterwards retained the absolute possession, paying only a small annuity to his child. Lord Hardwicke set aside the transaction in favour of the child's heir, not only on the ground of fraud, but also of the relationship between the parties. Again where a young man, on his coming of age, voluntarily granted to his guardian an annuity, at the time when the accounts were settled between them, and there also appeared in the case to have been some circumstances of imposition, the same Lord Chancellor ordered the grant to be vacated on the grounds of public utility as well as on the imposition. "But if," he said, "after the settlement of the accounts and at liberty, the ward, fully aware of the consequences, think fit to make a reasonable grant, by way of reward for his care and trouble, the Court would never set that aside." (d)

(a) *Huguenin v. Baseley*, 14 Ves. 273.

(b) *Wright v. Proud*, 13 Ves. 136. See also *Popham v. Brooke*, 5 Russ. 8.

(c) 2 Atk. 255.

(d) *Hylton v. Hylton*, 2 Ves. sen. 548.

So also in *Gibson v. Jeyes*, (a) Lord Eldon cancelled an annuity which had been sold to an old lady, infirm in mind and body, and at the advanced age of seventy-one, by her attorney, at an inadequate price. In this case he delivered an elaborate and excellent judgment, and determined that, as the attorney had not used that extreme degree of caution and diligence for the interests of his client, which the connection between the parties required, the transaction could not be supported. And in *Oliver v. Court*, (b) the Court of Exchequer set aside a purchase, at an inadequate price, by an auctioneer, of property he was directed to sell.

But the application of these equitable principles will be modified, in some respects, by the particular circumstances of each case. For if a party, having full knowledge of the value of his property, either by the express communication of his trustee, or from his own participation in the management thereof, still freely and voluntarily bestows an act of bounty upon the trustee or person confidentially connected with him, such an act may be supported. (c) And where there has been such full knowledge, and no unfair representation on the part of the trustee, a contract between them has been held valid. (d)

These are not however, universal, but may be modified by the circumstances of each case.

It is required that the party impeaching the act should clearly prove that the confidential relation was existing at the time it was executed. (e) Because the restraint exists so long only as the fiduciary and confidential connection remains; when once that is dissolved, it is removed, and the parties, becoming strangers, may as such contract or grant and receive gratuities. At the same time the dissolution of the connection between the parties is itself regarded with great jealousy, and will be examined with as much strictness as the transaction would have been if the connection had continued. (f) And when it is once shown

The confidential relationship must be proved to be existing at the time of the act.

(a) 6 Ves. 286.

(b) 8 Pri. 127.

(c) *Harris v. Tremenhere*, 15 Ves. 40.

(d) *Coles v. Trecothick*, 9 Ves. 234.

(e) *Evans v. Brown*, Wightw. 102. *Bellew v. Russell*, 1 Ba. & Be. 104. *Oldham v. Hand*, 2 Ves. sen. 259.

(f) *Ex parte Lacy*, 6 Ves. 625.

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that such a relation has existed, it lies upon the party filling the confidential character to prove that it had ceased. "I know," said C. B. Alexander, in a late case of *Williams v. Llewellyn*, (a) "my Lord Eldon has somewhere said that where a purchase is made by a person standing to the vendor in the relation of trustee or attorney, if the sale is afterwards questioned, it must lie upon that person representing that character to show that he had at the time of the purchase thrown off that relation, and had become adverse to the parties." See also the opinion of Lord Eldon in *Cane v. Lord Allen*, (b) where his lordship holds, that there may be instances in which the attorney's purchase of his client's property will be sustained.

Where a transaction is supported between a solicitor and his client, the former must prove that he paid such a price for the property as in the exercise of his professional duty he would have advised his client to accept from a third person (c).

(a) 2 Y. & J. 69.

(b) 2 Dow. P. C. 299.

(c) *Champion v. Rigby*, 1 Russ. & M. 539.

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CHAPTER III.

OF THE CONVEYANCE OF ANNUITIES.

AN ANNUITY, being either an incorporeal real right or existing by force of an obligation, can only be created and conveyed by deed, devise or bequest. (a)

Annuities must be created by deed or devise.

But an exception was made in early times, where co-parceners made partition, and a rent was granted to one out of the lands which had been holden in co-parcenary, for equality on the division. As the partition itself might have been by parol, so also it was not necessary that the rent should have been allotted by deed, but it might have been granted by mere words. (b) In like manner where it was granted to a widow, in satisfaction of her dower, no deed was requisite. (c) But if it issued out of other lands than those held in co-parcenary or subject to the dower it could not be by parol. (d) A rent granted on these considerations was said to be by common right.

Except in particular cases.

Although this was the rule at common law, it is apprehended that since the Statute of Frauds, (e) which requires that the conveyance of all interests in land shall be by deed, or by writing signed by the party granting or his agent, although a deed may not be necessary in these instances, yet the grant will not be valid, unless it be in writing. In practice it is not very probable that such a transaction will take place without a deed.

The proper instrument of conveyance is a deed of grant, whereby the grantor immediately and presently grants the rent out of the land charged, and covenants personally to pay the annuity. In most accurate deeds there is the grant of the annuity by the very word "grant." Hence an

A deed of grant is the proper instrument of conveyance.

(a) Perk. Grants, s. 61. In re Locke, 2 D. & R. 606.

(b) Litt. s. 250, 253.

(c) Ib. Hob. 153.

(d) March, 7.

(e) 29 Ch. II. c. 3, s. 3, 4. See 2 Bl. C. c. 20.

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agreement that Scott should redeem an annuity, formerly granted by Norris to Mores, and that Norris should grant an annuity to Scott, was held not to be the grant of an annuity, and therefore the executors of Norris were compelled to execute a proper grant (a). The Court of King's Bench also decided that an instrument which recited, that it had been agreed to sell an annuity secured upon property in the possession of the grantor, and witnessed, that the party *would execute* proper deeds of conveyance of the property, and covenants for the payment of the annuity, but contained no words of present grant, was not such a deed as conferred any right upon the intended grantee to sue for the arrears in a court of law (b).

Rents are
within the Sta-
tute of Uses.

Although at common law a rent can only be created by grant, yet it may be also created by the usual conveyances, which derive their force from the Statute of Uses. (c) Before that statute rents might have been conveyed to uses, though annuities in fee could not. (d) And by the 4th and 5th sections of that act it is enacted, "that the persons for whose use the rent has been granted shall be deemed to be in the seisin and possession of the rent, for the same estate as they had in the use, as if a grant or other lawful conveyance had been executed to them, by such as were or shall be seised to the use of the said rent, and they shall have power to distrain and avow, as though the rents had been granted to them with powers of distress, re-entry or other penalty." At first it was doubted whether this act was prospective and referred to rents subsequently granted, or was intended to apply to those existing at the date of the enactment only; it was, however, decided to be prospective. (e)

Before it a rent might have been created by a bargain and sale, because where money had been given for it as an equivalent, equity would supply what was wanting in legal

(a) Nield v. Smith, 14 Ves. 491.

(b) In re Locke 2 D. & R. 606.

(c) 3 Prest. Abr. 56.

(d) Sir W. Jones, 127.

(e) Danby v. Conyers, 1 And. 51; Anon. Dyer, 362 b.; Rivett v. Godson, Sir W. Jones, 179.

effect; but since the act a rent cannot be created by that instrument, because there must be a freehold in some other person, to be executed in the cestui que use, whereas the bargainor cannot have seisin of the rent, because he cannot have a rent in his own land(a). But where an estate is conveyed by bargain and sale or a covenant to stand seised, a rent may be newly created or limited out of the estate so created in the land by these conveyances, because they do not operate by the transmutation of possession(b).

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Where it is intended to limit a new rent to uses, it may be desirable to grant it to a stranger at first, who may regrant it to the intended uses, or it may be granted to the stranger to uses at once, when the legal estate will vest in him.(c) "This," says Mr. Butler, "will avoid a doubt which has been sometimes entertained of the effect of the statutes in executing such uses, on the general ground that the statute does not operate on any property which is not in existence before the conveyance to the uses; it also obviates an objection which sometimes arises on the grant of a rent to one for life, and after his decease to his sons successively in tail male, on the ground that each of the persons to whom it is limited takes a distinct rent; the consequence of which would be, that during the life of the tenant for life the rents could not be barred by a recovery, and the rents to the second and younger sons would be void for remoteness, as commencing after an indefinite failure of issue."(d)

How rents
should be li-
mited to uses.

Mr. Watkins, in his Treatise on Conveyancing, (e) says, that a rent may be created by a lease and release, but the *creation* of a rent seems hardly consistent with that instrument, which implies an existing estate.

Instruments of
conveyance of a
rent.

It may also be created by the deed to declare the uses of a fine or recovery levied or suffered of the land.(f)

(a) Gilb. Uses, 85.

(b) Rivett v. Godson, Sir W. Jo. 179; Sugd. n. to Gilb. Uses, 85.

(c) Sugd. n. above cited; Co. Lit. 271 b, Butl. note.

(d) F. C. R. 529, n.

(e) Page 179.

(f) Danby v. Conyers, 1 And. 51; Bend. 315.

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While, according to Shep. Touch. p. 11, a fine may be levied of a rent not previously existing by itself, and therefore a rent may be so created, but this admits of doubt. It has also been alleged that it may be created by a recovery. (a)

A rent being in existence, it may be undoubtedly conveyed by a fine or recovery, or grant at common law, or by any of the conveyances under the Statute of Uses, for of course the lease and release would be applicable in such a case. (b)

Conveyance of
annuities of in-
heritance.

In regard to an annuity of inheritance, it has already been stated that neither a fine can be levied of it nor a recovery suffered of it; and as it could not be holden to uses, the Statute of Uses does not apply to it, consequently it cannot be conveyed at law by any of the modes just mentioned. The proper form is a deed of assignment, which is a species of grant. At the same time if any other conveyance can be construed to operate as an assignment, such effect would probably be given to it; and in a court of equity it would doubtless be sustained as a declaration of trust.

As to determinable annuities, it has been before contended that they are not legally assignable; however as the assignment is available in equity, they may be assigned in like manner as perpetual annuities. Though as a practical observation it may be remarked that there should be contained in the deed the appointment by the assignor, if he be the original grantee, of the assignee as his attorney, so as to authorise him to sue on the original grant when a necessity arises.

Rents cannot be
created by way
of reservation.

Before the Statute *Quia Emptores* there might have been the creation of a rent charge by way of reservation; as if land were granted in fee, with a reservation of a rent and a power of distress. But since that statute this cannot be done. (c) If, however, a man grant or assign all his estate

(a) Watk. Conv. 179.

(b) Taylor v. Vale, Cro. E. 166; Baker v. Lade, 4 Mod. 149; Saunders and Savin's C. 1 Mod. 178.

(c) Perk. Reservation, s. 662; Roll. Abr. Annuity C.; — v. Cooper, 2 Wils. 375; Litt. s. 217.

and interest in the land, so that no reversion remains in him, and be still to have an annual sum paid him out of the land, the contract amounts in effect to the grant of a rent charge by the purchaser of the land, which will remain an incumbrance thereon at least in a Court of Equity. (a)

A deed of confirmation will also operate as a grant of an annuity. It is resolved in *Anne Mayow's case*, (b) that if a feoffee upon condition grant a rent in fee, and the feoffor by another deed confirm it to the grantee and his heirs, and after the condition be broken, and the feoffor enter for the condition broken, yet the rent remains. And it is decided in that case that, where the feoffor joined the feoffee in the grant of a rent charge, though there was only one deed, yet it enured by way of confirmation, and was not affected by the subsequent breach of the condition.

Rent may be
granted by deed
of confirmation.

Formerly a mode prevailed of granting a rent, or annuity, by demise and re-demise, which was thus. (c) The intended grantor being seised or possessed of an estate intended to be charged, in consideration of the money advanced for the annuity, demised the land to the grantee for a term of years at a nominal rent, providing that the lessee should re-demise the same to the grantor at a certain rent which amounted to the annual payment of the annuity. By an indenture of even date the grantee re-demised the same land to the grantor at the stipulated rent, and retained a right of entry and a power of distress on the default of payment. At first the grantee assigned his interest back to the grantor, but that was attended with this consequence, that the power of distress was gone, and on the assignment the term merged in the greater estate of the original lessor, and therefore his heir would not have been bound by the demise, except he were expressly rendered liable by the covenant to pay the rent. Hence the re-demise in the form of an under-lease

Mode by way
of demise and
re-demise.

(a) 3 Prest. Abs. 55.

(b) 1 Co. 147 b; Poph. 50, by the name of *Kettle v. Esterby*; Co. L. 300 a.

(c) *Floyd v. Langfield*, 1 Freem. 218; *Goodright d. Hare v. Board*, 3 Doug. 148; 3 Wood's Conv. 119.

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was adopted. This proceeding was complicated, and now would be very expensive, but it appears to have been introduced when doubts were entertained as to the legality of rents charged for the security of an annuity. And by this method the grantee was enabled to render his distress available, since he stood in the situation of a landlord, and, therefore, after the statute, 1 & 2 W. III. c. 5, was empowered to sell the goods taken on the distress, a power which the grantee of a rent charge does not possess even to this day, unless it be expressly given in the grant.

In the Courts of Equity this was considered in its true character of the grant of an annuity; and therefore, if the grantor left any arrears at his death, though the heir was liable for the accruing payments, the personal estate of the deceased was responsible for those arrears to the heir. (a)

Rents and annuities by prescription.

Rents and annuities sometimes exist by prescription, in which case, as in other prescriptive rights, long enjoyment leads to the presumption of a grant before the time of memory. Where rents are annexed to manors, if they be by prescription, they may be parcel of the manor, and will therefore pass on the conveyance of the manor though not mentioned, and even though the word "appurtenances" be omitted. (b) But it is doubted whether, when a rent has been created within the time of legal memory, it must not be specifically named in the conveyance, because it seems that a grant of a manor, and of all lands and rents parcel or reputed parcel of the manor, is not sufficient to carry the new rent. (c)

Indirect grants of annuities.

Hitherto the direct grant of annuities and rents has been considered, but there are several modes by which an annuity is commonly granted, though indirectly. Thus the grantor executes a bond in a penalty conditioned for the due payment of the annuity, which becomes absolute on any default; and he usually gives a warrant of attorney to enter up judgment against him in a certain sum, which is subject to a defeazance, containing similar conditions.

(a) *Cocker v. Bevis*, 2 Freem. 129.

(b) *Anon. Godb.* 3.

(c) *Foreman v. Bobham*, Moore, 190.

Where a party is himself in the enjoyment of any personal property, the payments on which accrue periodically, he sometimes assigns this to a trustee, who receives the payments as they arise, and pays them over to the grantee. This, it is obvious, may amount to the grant of an annuity, though indirectly. The distinction between the assignment of the dividends on stock absolutely, and as a security for an annuity, has been already considered, (a) and occasion will occur for farther observations in the Chapter on the Security for the Grant.

Although an agreement to grant an annuity cannot be enforced in a court of law as the grant itself, yet it will entitle the party to an action for damages if it be broken. Where the agreement is not under seal, it forms the evidence of a promise, and the courts will entertain an action of assumpsit thereon. But they will require the party suing to prove a consideration for the promise, otherwise the action cannot be supported. Thus it was held, in an action of assumpsit, that a promise to pay an annuity by a man to his mistress on separation, was void for want of a consideration, especially as there was no allegation that she had been seduced by him; the Court distinguished it from actions on bonds, because there the specialty does not require the proof of consideration (b). There was a case of *Gibson v. Dickinson*, (c) where an assumpsit was held maintainable by a woman under similar circumstances, who had been separated, but there it was alleged, that the defendant had had the loan of certain money from the plaintiff, which formed a part of the consideration, and the attention of the Court was not drawn to this point.

The agreement to grant may be sued on in a court of law.

So *past* service or kindness will not constitute a good consideration for such a promise. (d) But it has been held that forbearing to sue the grantor at the request of his

(a) Page 6.

(b) *Binnington v. Wallis*, 4 B. & A. 630.

(c) 3 M. & S. 463.

(d) *Cluff v. Moore*, 1 Sid. 413; 1 Vent. 27; 2 Keb. 488, 507.

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A specific performance enforced in equity.

bailiff, who was authorised to pay the annuity, was a good consideration for a promise to pay by the latter. (a)

As in equity a contract agreed to be executed is considered as executed, if the grant of an annuity remain in agreement only, a Court of Equity will compel a specific performance. It matters not that the contract has become more beneficial to one party than to the other, by the accident of the death of the annuitant. Thus in *Mortimer v. Capper* (b) an estate was sold for a certain sum and an annuity for the vendor's life. The annuitant died two days after the contract was reduced into writing. The vendee filed a bill against the heir for a specific performance, and it was decreed. Shortly after occurred the case of *Jackson v. Lever*: (c) there a contract was entered into for the purchase of an estate, to be paid for by the grant of an annuity to the vendor, with a proviso to be void if the vendor died before a certain day. He survived that day, and a payment of the annuity becoming due, it was tendered, but not received, through some delay on the part of the vendor, who died before the payment was actually made and the conveyance executed. The Lord Chancellor here also decreed a specific performance.

" And in *Pritchard v. Ovey*, (d) where a party contracted to sell an annuity to commence from the date of the agreement and to continue during three lives, to be nominated by the grantee within four months; and afterwards, before the grantee had fully examined the grantor's title, broke off the contract, and thus prevented the nomination of the lives, the Master of the Rolls decreed a specific performance, requiring the grantee to nominate lives in being at the date of the agreement.

The party applying must not be in delay himself.

Where the party requiring the specific performance is in delay at the time when any contingency happens, which is

(a) *Davison v. Haslip*, 1 Vent. 152; 2 Lev. 20; Ray. 211.

(b) 1 B. C. C. 155.

(c) 3 B. C. C. 605. See also *Kenny v. Wexham*, 6 Madd. 355.

(d) 1 J. & W. 396.

beneficial to one and disadvantageous to the other, the Court refuses to interfere. Thus in *Pope v. Roots*, (a) the plaintiff agreed to grant an annuity to one Roots, as the consideration for the conveyance of certain lands; and it was agreed that the conveyance should be prepared on or before Oct. 31, 1770, the annuity, which was to be payable half-yearly, being to commence from the previous April 5. Through accident the deeds were not executed on the 31st of October, and the annuity due on the 5th of October was not paid, but on Nov. 12, Roots died. Pope filed a bill against Roots' representatives for a specific performance, offering to pay the arrear of the annuity. But the Lord Chancellor Bathurst dismissed it. From his judgment there was an appeal to the House of Lords. The appellant urged that the agreement was complete, and was to be considered as if executed at the time fixed for the execution. The respondent contended that the plaintiff had not taken any step to carry it into execution until after Roots' death, when it was clear the latter could derive no benefit from the contract. And the appeal was dismissed. The reader is also referred to *Cary v. Pulsford*, Pr. Ch. 95.

Again: the agreement itself must be complete, for a matter still in treaty, or which was interrupted while merely in proposal, will not be enforced. (b)

The agreement must be complete.

Neither will the Court interfere where there is merely a personal obligation created by a contract, for the breach of which redress may be obtained in a Court of Law. As where a party agreed, on the contingency of a certain event, to pay an annual sum by quarterly instalments, that event having happened, the Court of Equity left the payee to his legal remedy. (c)

There must not be a legal remedy on the instrument.

Where time forms a material essence of a contract, the agreement will not be enforced if the parties have neglected to attend to it. The determination of the question whether it be so or not depends upon the evidence of the case, though the nature of the property, which is the subject

Whether time forms the essence of the contract.

(a) 1 B. P. C. 370, ed. To.

(b) *Dally v. Catchlow*, 4 Pri. 147.

(c) *Brough v. Oddy*, 1 Russ. & M. 55.

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matter of the contract, will sometimes enable the Court to form a correct judgment. Accordingly there seems reason to think that an annuity is a species of property in which time must form a material ingredient. Thus if the vendor do not produce a good title at the appointed time, it is not then saleable, and by the possible loss of life and by the certain increase of the annuitant's age, its value may be wholly gone or much depreciated when the title is tendered. (a)

There must be a mutuality of remedies.

The Court will compel a specific performance where the remedies can be mutual. As if an annuity be contracted to be sold, and the annuitant die after the vesting of the title, a specific performance will be enforced for the benefit of the grantor, and he will not be compelled to resort to his legal remedy for the recovery of the purchase-money. But where they would not be mutual, as where the title had not vested, so that the party purchasing an annuity could not compel a specific performance, no such decree will, it seems, be made for the vendor. (b)

The agreement must not be voluntary.

As a party cannot recover at law on a voluntary agreement, so a Court of Equity will not carry it into effect. And, therefore, where a married woman separated from her husband for several years, cohabited with another man, and then they parted, and, as she alleged, he promised to allow her an annuity for her life, and paid it to her while he lived, on a bill filed by her against his executrix for a specific performance, the Vice Chancellor said the agreement was not founded on any good, meritorious or valuable consideration, and refused to decree a performance. (c)

As to the effect of the Statute of Frauds on the agreement.

An agreement to grant an annuity is present, and would not be avoided by the Statute of Frauds, though it were only expressed in words and not in writing. Therefore the House of Lords, in the case of *Lady Herbert v. Earl of*

(a) *Withy v. Cottle*, Turn. 78; 2 S. & S. 174.

(b) *Kenny v. Wexham*, 6 Madd. 355.

(c) *Matthews v. L* —e, 1 Madd. 558. See also *Jameson v. Skipwith*, 1 B. C. C. 34; 1 B. P. C. 376, ed. To; *Coleman v. Sarel*, 3 B. C. C. 12.

Powis, (a) decreed the payment of an annuity, where the agreement had been merely in parol. There must be, however, a clear and explicit promise, or a Court of Equity will not enforce it, mere presumption of intention will not be sufficient. (b) In regard to an agreement to pay an annuity, this, though at law invalid, is available in equity. If it be in parol without a note in writing, there may be a question whether the fourth section of that statute would not apply, by which it is enacted, that every agreement which is not to be performed within the space of one year must be in writing. Now though, if the annuity be made payable half-yearly, the annuitant may die within the year, in which case the agreement would be completed within that time, yet the parties evidently expect and intend that it shall exceed that period. In *Gilbert v. Sykes*, (c) a wager on receiving 100 guineas, to pay one guinea per diem during the life of Napoleon Buonaparte, was held not to fall within that section, because it was clearly the intention and expectation of the parties that it would be completely performed within the year. If such an agreement to pay an annuity be void under this statute, a Court of Equity would not enforce it.

When the agreement to grant an annuity is not immediate, the point for consideration is here also, whether it is to be granted within the year or not, for if it be, the statute will apply; otherwise not. If it depend on a contingency, and it do not appear that it is to be performed after the lapse of the year, a note in writing will not be required, but where it appears, from the tenor of the agreement, that it is not to be performed within the year, a note will be necessary. Thus in *Fenton v. Emblers*, (d) a parol agreement to grant an annuity by will was held to be valid against the personal representative, the testator not having granted it by will or otherwise, because the testator might have died within the year after his promise.

Rule where the agreement depends on a contingency.

(a) 1 B. P. C. 355. Ed. To.

(b) *Jameson v. Skipwith*, 1 B. C. C. 34; 1 B. P. C. 376, ed. To.

(c) 16 East, 150.

(d) 3 Burr. 1278; S. C. 1 Sir W. Bl. 353.

CHAP. III.
OF THE
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Devises of rents
under the Sta-
tutes of Wills
and Frauds.

Hitherto of Grants *inter vivos*: a rent may also be created or conveyed by devise, and an annuity by bequest. Anciently, as before observed, a rent was not the subject of devise, except by way of uses, the statute 32 Hen. VIII. c. 1, gave power to any person seised of lands, tenements, and hereditaments, to devise the same, but did not mention rents, and the hereditaments are expressly stated to be such as are holden in tenure, which rents are not. The statute 34 Hen. VIII. c. 5, however, enumerates rents in which any person has a fee simple, and authorises the devise thereof, or of any rent out of the devisor's lands by writing. By the Statute of Frauds all devises of tenements devisable by the Statutes of Wills or by that statute are subjected to certain formalities, not necessary to be here enumerated. Therefore, a devise of an existing rent in fee, or of one in which the devisor had an estate *pour autre vie*, (over which the power of devising is given by the Statute of Frauds,) or of one which is created by the devisor himself, must be in writing, and attended with the formalities alluded to.

Hence there could not be a nuncupative devise of a rent, and though in one case (a) it was held that a nuncupative devise of a rent-charge to a charity was good as an appointment, within the statute 43 Eliz. c. 4, yet in a subsequent case Lord Harcourt held the Statute of Wills applied, and was not affected by the statute of Elizabeth. (b)

Where a parol
devise has been
enforced.

But where a party intending to charge an annuity on land has been induced to forbear by the promise, made by the heir or intended devisee of the land, to pay it, that promise, although parol, will be enforced in equity, as in *Oldham v. Litchfield*. (c) There one devised an estate to his brother, and made him his executor, and willed that his executor should, out of his personalty, and the first half-year's rents of his realty, pay his legacies; and afterwards bequeathed an annuity of 40*l.* to his nephew, to maintain

(a) *Goddard's case*, Duke's Ch. Uses, 81.

(b) *Jenner v. Harper*, 1 P. W. 247; Salk. 163.

(c) 2 Vern. 506; 2 Freem. 284.

him at Cambridge, to be paid by his executor. Not being charged expressly on the real estate, the executor refused to pay the annuity, and had no other assets. It was proved, however, that the brother had promised the testator to pay this annuity, otherwise he would have charged it on the estate. The executor was therefore decreed to pay it, his fraud having dispensed with the provisions of the Statute of Wills. It has also been decided in a court of law, that an *assumpsit* may be maintained on a promise to pay an annuity, in consideration that the land, which would have descended upon the party making the promise, was not charged with it. The action was brought by the intended grantees, and the Court held clearly that it was well brought, and that there was a good consideration. (a)

In another case, (b) however, where one of three devisees promised to execute a bond to secure an annuity, which the testator was about to charge on the estate, and a draft was proposed, but not executed, though the testator lived six weeks after, the Lord Chancellor, on an appeal from the Master of the Rolls, dismissed a bill filed nine years after the testator's death, to enforce the promise, because it was an attempt to charge land without regard to the regulations of the statutes, and there was no fraud alleged.

In regard to rents of which a chattel interest only is given, (if they can be bequeathed by testament,) (c) and annuities, there will be no distinction between them and other personal property. They may be either newly created or may be conveyed as any other personalty; and it will only be necessary that the executor should give his assent to the legacy.

Bequests of Annuities.

Formerly, in order to complete the grant of a rent, it was necessary that the grantor, if the conveyance was one which operated at common law, should give seisin of the rent at the time of the grant to the grantee, which was usually

Seisin and attornment formerly required.

(a) Rookwood's case, Cro. Eliz. 164.

(b) Whitten v. Russell, 1 Atk. 447.

(c) Of this the author entertains some doubt; he is not aware of any authority either way.

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done by the payment of a small sum of money. When the land was in the possession of a tenant, he was required to attorn to the grantee, before the grant could be effectual against the land; (a) but by the 4 Anne, c. 16, s. 9, 10, attornment is not required from the tenant of the land, but after notice of the grant he shall be liable as he would have been if he had expressly attorned.

When not.

If the conveyance obtained its validity from the Statute of Uses, no seisin nor attornment was requisite, (b) neither was the latter necessary when the rent was conveyed by the operation of law, as when it was extended on an *elegit*, or when the widow obtained her dower out of it. (c)

It is not the practice to give seisin in any case at present. As to rents claimed by prescription, the seisin is the evidence of the right, and must be alleged, by the provision of the Statute of Limitation, which will be mentioned hereafter. (d)

It is not proposed to give forms of the different instruments by which the rent or annuity may be granted, secured and conveyed. For these the reader is referred to the Precedents in Conveyancing published by Mr. Bythewood, Vol. I. and II., and by Messrs. Barton and Wilde, Vol. VI., where he will find a large collection. There are also some precedents appended to Withy's Treatise on Annuities.

The stamps and duties payable on the grants of annuities.

Besides the formalities which the law requires in each particular instrument, the legislature has imposed certain regulations upon the subjects of this treatise, which require an accurate attention. They are, first, the stamps, which are to be affixed to the instruments of grant, and the duties, which are in some cases payable in respect thereof. And, secondly, the registration of rents and annuities.

Before the statute 48 Geo. III. c. 149, no stamp duties were specifically applicable to annuities; but as far back as the oldest stamp act in the reign of Will. & Mary, an indenture, bond, or other deed, has been subject to the pay-

(a) Taylor v. Vale, Cro. Eliz. 166, Litt. s. 556.

(b) Ibid. Co. Lit. 309, b.

(c) Moore, 32.

(d) Chapter VIII.

ment of a stamp duty, which has varied in amount during that long period. And as an annuity could only have been granted by a deed or indenture, or was secured by a bond, the grant of an annuity was of course subjected to the stamp imposed on any other deed.

But by the statute 48 Geo. III. c. 149, sched. 1, the following provisions have been made in reference to annuities, and have been continued by the statute 55 Geo. III. c. 184, which increased the amount of the duties. To avoid prolixity this amount has been ranged in two columns, the first contains that imposed by the former act, the second that by the latter.

BOND given as the *only or principal security for the payment of any annuity* upon the original creation and sale thereof. See Conveyance upon the Sale of Lands, &c.

BOND given as a *collateral or auxiliary security for the payment of any annuity*, upon the original creation and sale thereof, where the same shall be granted, or conveyed, or secured by any other deed or instrument liable to and charged with the *ad valorem* duty hereinafter imposed on conveyances upon the sale of any property

£1 0 0

BOND given as a *security for the payment of any annuity* (except upon the original creation and sale thereof) or of any sum or sums of money stated periods (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack) for any definite and certain term, so that the total amount of the money to be paid can be previously ascertained.

The same duty as on a bond of the like nature for the payment of a sum of money equal to such total amount.

BOND given as a *security for the payment of any annuity* (except as aforesaid) or of any sum or sums of money at stated periods (not being interest for any principal sum nor rent reserved or payable upon any lease or tack) for the term of life or any other indefinite period, so that the whole money to be paid cannot be previously ascertained.

	48 G. 3. c. 149.	55 G. 3. c. 184.
	£ s. d.	£ s. d.
Where the annuity or sums secured shall not amount to 10 <i>l.</i> per annum	1 0 0	1 0 0
And where the same shall amount to 10 <i>l.</i> and not amount to 50 <i>l.</i> per annum	1 10 0	2 0 0
50 <i>l.</i> 100 <i>l.</i>	2 0 0	3 0 0
100 <i>l.</i> 200 <i>l.</i>	3 0 0	4 0 0
200 <i>l.</i> 300 <i>l.</i>	4 0 0	5 0 0
300 <i>l.</i> 400 <i>l.</i>	5 0 0	6 0 0
400 <i>l.</i> 500 <i>l.</i>	6 0 0	7 0 0
500 <i>l.</i> 750 <i>l.</i>	7 0 0	9 0 0
750 <i>l.</i> 1000 <i>l.</i>	9 0 0	12 0 0
1000 <i>l.</i> 1500 <i>l.</i>	12 0 0	15 0 0
1500 <i>l.</i> 2000 <i>l.</i>	15 0 0	20 0 0
2000 <i>l.</i> or upwards	20 0 0	25 0 0

BOND, commonly called counter-bond, for indemnifying any person who shall have become bound or engaged as surety or cautioner for the payment of any annuity

1 0 0 1 15 0

GENERAL DIRECTIONS RESPECTING BONDS.

Where any such bond as aforesaid, together with any schedule, receipt, or other matter, put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, there shall be charged, for every entire quantity of 1080 words contained therein over and above the first 1080 words, a further progressive duty of

1 0 0 1 5 0

And where any such bond as aforesaid shall be given as a security for the payment of a sum of money, and also of a share in any of the stocks or funds before mentioned, or an annuity, or both; or for the payment of an annuity, and also of a share in any of the said stocks or funds, the proper *ad valorem* duty shall be charged in respect of each.

And where any such bond as aforesaid shall be given as a security for the payment or transfer to different persons of separate and

distinct sums of money, or annuities, or shares in any of the stocks or funds before-mentioned, the proper *ad valorem* duty shall be charged in respect of each separate and distinct sum of money, or annuity, or share in any of the said stocks or funds therein specified and secured, and not upon the aggregate amount thereof.

And where any bond in England shall be given as a security for the performance of any covenant or agreement for the payment or transfer of any annuity, such bond shall be charged with the same duty as if the same had been immediately given for the payment or transfer of such annuity.

And where in England any bond for the payment or transfer, or for the performance of any covenant for the payment or transfer of any annuity, shall be contained in one and the same deed or writing with any other matter or thing in this schedule specifically charged with any duty, (except any declaration of trust of the annuity secured,) such deed or writing shall be charged with the same duties as such bond and other matter or thing would have been charged with if contained in separate deeds.

CONVEYANCE, whether grant, assignment, transfer, release, renunciation, or of any other kind or description whatsoever *upon the sale* of any rents or annuities, or of any right, title, interest, or claim in, to, out of or upon any lands, tenements, rents, annuities, or other property; that is to say, *for and in respect of the principal or only deed or instrument* whereby the lands or other thing sold shall be granted, assigned, transferred, released, renounced or otherwise conveyed to or vested in the pur-

chaser or purchasers, or any other person or persons, by his, her or their direction,		48 G. 3. c. 149.	55 G. 3. c. 184.
Where the purchase or consideration money therein or thereupon expressed shall not amount to 50 <i>l.</i>		<i>l.</i> <i>s.</i> <i>d.</i> 0 15 0	<i>l.</i> <i>s.</i> <i>d.</i> 0 10 0
Where the same shall not amount to 20 <i>l.</i> . .			0 10 0
Where the same shall amount to			
20 <i>l.</i> but not to 50 <i>l.</i>		. . .	1 0 0
50 <i>l.</i> 150 <i>l.</i>		1 0 0	1 10 0
150 <i>l.</i> 300 <i>l.</i>		1 10 0	2 0 0
300 <i>l.</i> 500 <i>l.</i>		2 10 0	3 0 0
500 <i>l.</i> 750 <i>l.</i>		5 0 0	6 0 0
750 <i>l.</i> 1000 <i>l.</i>		7 10 0	9 0 0
1000 <i>l.</i> 2000 <i>l.</i>		10 0 0	12 0 0
2000 <i>l.</i> 3000 <i>l.</i>		20 0 0	25 0 0
3000 <i>l.</i> 4000 <i>l.</i>		30 0 0	35 0 0
4000 <i>l.</i> 5000 <i>l.</i>		40 0 0	45 0 0
5000 <i>l.</i> 6000 <i>l.</i>		. . .	55 0 0
. 7500 <i>l.</i>		50 0 0	
6000 <i>l.</i> 7000 <i>l.</i>		. . .	65 0 0
7000 <i>l.</i> 8000 <i>l.</i>		. . .	75 0 0
7500 <i>l.</i> 10,000 <i>l.</i>		75 0 0	
8000 <i>l.</i> 9000 <i>l.</i>		. . .	85 0 0
9000 <i>l.</i> 10,000 <i>l.</i>		. . .	95 0 0
10,000 <i>l.</i> 15,000 <i>l.</i>		100 0 0	
. 12,500 <i>l.</i>		. . .	110 0 0
12,500 <i>l.</i> 15,000 <i>l.</i>		. . .	130 0 0
15,000 <i>l.</i> 20,000 <i>l.</i>		150 0 0	170 0 0
20,000 <i>l.</i> 30,000 <i>l.</i>		200 0 0	240 0 0
30,000 <i>l.</i> 40,000 <i>l.</i>		300 0 0	350 0 0
40,000 <i>l.</i> 50,000 <i>l.</i>		400 0 0	450 0 0
50,000 <i>l.</i> or upwards		500 0 0	
And not to 60,000 <i>l.</i>		. . .	550 0 0
60,000 <i>l.</i> 80,000 <i>l.</i>		. . .	650 0 0
80,000 <i>l.</i> 100,000 <i>l.</i>		. . .	800 0 0
100,000 <i>l.</i> or upwards		. . .	1000 0 0

There are various directions respecting the stamps on conveyancing, which are too numerous and miscellaneous to be inserted here, for which the statutes themselves must be consulted, but this one provision may be introduced.

Where upon the sale of any annuity, or other right not before in existence, the same shall not be created by actual grant or conveyance, but shall only be secured by bond, warrant of attorney, covenant, contract or otherwise; the bond or other instrument, by which the same shall be secured, or some one of such instruments, if there be more than one, shall be deemed and taken to be liable to the same duty as an actual grant or conveyance.

It has been determined on this part of the schedule of the statute 55 Geo. III. c. 184, that the legislature must be taken to have used the words *sale of an annuity* in their ordinary meaning and acceptance; and, therefore, where A. being entitled during his life to the dividends of certain Bank Annuities, and B. being entitled to the stock at the death of A., it was agreed between them that in consideration of A.'s permitting B. to sell out the stock, the latter should pay to A. during his life, an annuity equivalent to five per cent. on the principal money produced by the sale of the stock; and that, as a security for the payment of the annuity, B. should assign to A. a policy of assurance on goods on a voyage to India. By deed reciting these facts, and that the stock had been sold and produced a certain sum, which had been paid to B., the latter bargained, sold and assigned to A. the policy, and covenanted that in case no money should be produced by the policy, he would within one month after his return from the voyage he was about to make to India, pay to A. a sum of money, which, when invested in stock, would produce an annuity equal to five per cent. on the principal money produced by the sale of the stock. It was held that the deed did not require an *ad valorem* stamp, the transaction described in it not being a sale of an annuity. Parke, J. observed, "that part of the schedule applies to cases where the purchase, or consideration money, is expressed in the deed."^(a)

And on the statute, 48 Geo. III. c. 149, Lord Ellen-

(a) *Blandy v. Herbert*, 9 B. & C. 396.

CHAP. III.
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DUTIES.

borough held, at *Nisi Prius*, that where the consideration is merely the surrender of a trade or good will, and there is some pecuniary agreement, which is only auxiliary thereto, an *ad valorem* stamp is not necessary. As where one party covenanted to give up his trade, and to allow the other to carry it on in his house, paying 1000*l.* for the house and fixtures, and an annuity of 1000*l.* for ten years, his lordship held that a common deed stamp was sufficient. (a)

In *Hammond v. Foster* (b) an annuity was granted by A. to B., and was redeemed by virtue of a clause of redemption in the deed. The instruments were then delivered up to the grantor uncanceled, and it was agreed that if at any future time more money should be required on the same terms, they should be used as the security. A subsequent application was made and the deeds were delivered back. The Court of King's Bench held the transaction to amount in substance to the grant of another annuity, and therefore that the deeds ought to have been re-stamped.

But where the consideration was advanced by two persons, though the annuity was granted to one only, and the deed stated that he was to be a trustee as to a part for the other, it was held to be only in law the grant of one annuity, and that one stamp was sufficient. (c)

As to the re-
demption
clauses.

A clause for redemption, if part of the original agreement, need not be stamped as a fresh deed, though indorsed on the grant. But any subsequent covenant so indorsed will require a fresh deed stamp. (d) And with regard to releases under such clause of redemption, it is provided by stat. 55 G. III. c. 184, s. 31, that the releases or other conveyances of annuities or rent charges, made in the original grant thereof subject to be redeemed or re-purchased, shall, on the re-purchase thereof, be exempted from the *ad valorem* duty thereby imposed on conveyances on

(a) *Lyburn v. Warrington*, 1 Stark. C. 162. See also *Mounsey v. Stephenson*, 7 B. & C. 403.

(b) 5 T. R. 635.

(c) *Cook v. Jones*, 15 East, 237.

(d) *Schuman v. Weatherhead*, 1 East, 537.

the sale of any property, and shall be charged only with the ordinary duty on deeds or instruments of the like kind not upon a sale.

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One other provision in this act, under the article MORTGAGE, in the schedule, may be mentioned, by which it is enacted, that where a mortgage is made to secure the repayment of an uncertain sum, "other than and except money to be advanced for the insurance of any life or lives pursuant to the agreement in any deed, whereby any annuity shall be granted or secured for such life or lives," a stamp of 25*l.* shall be payable. Therefore the insurance of the annuitant's life will not bring the sum within this duty.

GRANT (a) under the Great Seal of the United Kingdom of Great Britain and Ireland, or under the Privy Seal in England, unless directed to the Great Seal, or under the Sign Manual of his Majesty, his heirs or successors, unless directed to any of the seals aforesaid, out of the civil list either of England or Scotland, or out of any other fund, not being part of the supplies of the year or appropriated by parliament.

	£	s.	d.
Of any annuity or pension not amounting to 100 <i>l.</i> per annum	1	10	0
Amounting to 100 <i>l.</i> and not amounting to 200 <i>l.</i> per annum	4	0	0
200 <i>l.</i> 400 <i>l.</i>	10	0	0
400 <i>l.</i> 600 <i>l.</i>	20	0	0
600 <i>l.</i> 800 <i>l.</i>	30	0	0
800 <i>l.</i> 1000 <i>l.</i>	40	0	0
1000 <i>l.</i> per annum, or upwards	50	0	0
But where any such grant of an annuity, or pension, shall be made in confirmation, or by way of renewal only, of any former grant of the like amount and description, then only a duty of	1	10	0
And where several and distinct annuities or pensions shall be granted to or for the			

(a) 48 Geo. III. c. 149. Sch. Pt. 1. 55 Geo. III. c. 184. Sch. Pt. 1.

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pension of different persons, by the same instrument, the proper duty shall be charged in respect of each annuity or pension; but where the grant shall be of any annuity or pension to or for the benefit of two or more persons jointly, the duty shall be charged in respect of the whole.

The duties on public annuities and pensions.

Thus far of the stamps which are to be imposed upon the different instruments of conveyance. Besides these, certain duties are also payable in some cases, and require to be noticed here. Public annuities, or pensions, are rendered liable to the payment of a tax of 4*s.* in the pound, which is imposed annually. In the 4 W. & M. c. 1, by which the land-tax was first imposed, a tax of 4*s.* in the pound was charged upon all the salaries of public officers, and afterwards the same tax was imposed upon annuities and pensions payable out of the king's revenue, the stat. 31 G. II. c. 22, appointing that 1*s.* in the pound should be paid, which was raised to 4*s.* by the 38 G. III. c. 5, s. 3, which has been continued annually by act of parliament, the last act being 2 W. IV. c. 8, by which the duty is continued for one year. The annuities payable to the royal family, and certain other pensions and salaries, are exempted from the payment of these duties.

The land-tax.

Rents are expressly charged with the payment of the duty of 4*s.* in the pound imposed by the 4 W. & M. c. 1. upon land, which was continued by annual acts till the 38 G. III. c. 60, made the tax perpetual.

The legacy duties payable on the bequest of annuities and devise of rents.

Such are the duties imposed upon the grants of annuities and rents; other duties are also payable when they have been bequeathed or devised, according to the degree of relationship existing between the testator and the legatee. By the statutes 20 Geo. III. c. 28, 23 Geo. III. c. 58, and 29 Geo. III. c. 51, certain duties were imposed upon receipts given for legacies left by will. But the Court of Common Pleas were of opinion that they did not apply to the case where annuities were bequeathed. (a) The statute

(a) *Green v. Croft*, 2 H. BL. 30.

36 Geo. III. c. 52, was then passed, which transferred the duties from the receipts to the legacies, varying the rate charged according to the degree of relationship, and expressly applying to the bequest of personal annuities.

In order to enable the duties to be properly assessed and paid upon such bequests, the following provisions were enacted.

By section 8, the value of any legacy given by way of annuity, whether payable annually, or otherwise, for any life or lives, or for years, determinable on any life or lives, or for years or other period of time, shall be calculated and the duty chargeable thereon shall be charged according to the tables in the schedule annexed, and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively before or on completing the respective payments of the three succeeding years' annuity respectively, and the value of any such annuity, if determinable on any contingency besides the death of any person or persons, shall be calculated without regard to such contingency; provided always, that if any such annuity shall determine by the death of any person before four years' payment of such annuity shall become due and payable, then, and in such case, the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time determine on any other contingency than the death of any person or persons, then, and in such case, not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease; but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due to apply for and obtain a return of so much of the duty so paid as will reduce the same to the like duty as would have been payable by such person or

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persons for such annuity calculated according to the term for which the same shall have endured; which abatement the said commissioners for management of the stamp duties shall settle and determine according to the tables in the schedule hereunto annexed, and shall cause the amount of such abatement to be paid to the person or persons entitled to the same, out of any monies in their hands arising from the duties imposed by this act.

By section 9, the value of any legacy given by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or other period of time, and charged on and made payable out of any other legacy or legacies, shall be calculated and the duty shall be charged thereon in the same manner as before directed with respect to other annuities, and the duty on the legacy charged with such annuity, if any duty shall be payable for such legacy, shall be calculated on the value of such legacy, after deducting the value of such annuity; and the duty for such annuity shall be paid by the person or persons entitled to the legacy or legacies charged with such annuity, by four equal payments, in the same manner as the same would be payable according to the provisions hereinbefore contained, if such annuity had been a direct gift to the annuitant and subject to the like proviso in case such annuity shall determine before four years' payment shall become due, and the payment which shall be made for such duty shall be retained by the person or persons paying the same out of the first four years' payments of such annuities, if so many shall become due, or out of so many of such payments as shall become due, by equal portions.

By section 10, the duty payable on any legacy given by direction to purchase, with any personal estate of the testator or testatrix, or any part thereof, an annuity of a certain amount for the life or lives of any person or persons, or any other term, shall be calculated upon the sum necessary to purchase such annuity, according to the tables before-mentioned, and shall be deducted from such sum, and be paid as in the case of other pecuniary legacies, and the

person or persons paying or satisfying such legacy, and the person or persons for whose benefit the same shall be paid or satisfied, shall be discharged by payment of such duty, so calculated as aforesaid, from all other demands in respect of the duty payable on such legacy, and the annuity to be purchased for the benefit of the person or persons entitled to the benefit of such legacy shall be reduced in proportion to the amount of the duty payable thereon as aforesaid, such reduction to be calculated in the same manner as the duty so payable is hereinbefore directed to be calculated, and the purchase of such reduced annuity, together with the payment of such duty, shall satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity so directed to be purchased.

To the statute were appended three very elaborate tables for the calculation of annuities. The first determines the value of an annuity of 100*l.* on a single life from birth to ninety. The second, on the joint continuance of two lives. The third is for the payment during a fixed term of years, not exceeding ninety.

The act, however, only extended to personal legacies, and therefore to annuities charged on the personal estate only, but the 45 Geo. III. c. 28, which increased the rate of the duty payable on legacies, extended the provisions to legacies charged on real estate, and therefore to rents devised. Which duty, it is directed by section 5, shall be paid by the trustee appointed to sell the estate, or the devisee thereof, or the person empowered or required to pay the legacy, and he may retain it out of the legacy he is directed to pay. By statute 48 Geo. III. c. 149, and 55 Geo. III. c. 184, the duties were increased, but the former regulations were continued.

It has been lately argued in the Exchequer, that these latter statutes do not apply to a rent charged upon land, but only to an annuity, for which the real estate may be a security. But it was decided by the Court, that where land was devised to trustees in trust for A. B. for life, and after

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her decease that her husband should receive by and out of the land and the rents thereof, an annuity or clear yearly rent-charge of 500*l.* payable quarterly, with such powers and remedies of distress and entry and perception of rents, in case the said annuity of 500*l.* should be in arrear, as are reserved to lessors for the recovery of rents on leases for years, it was a gift by way of annuity, out of or charged upon real estate within the language of the statute, and therefore liable to the duty. (a)

In regard to the person who was to pay it, the land was devised in equal moieties to one for life, and the other in fee, and therefore they were jointly liable for the payment of the annuity. Hence, the Court held, in the same case, that the Crown could call upon these devisees jointly for payment of the duty.

A legacy of 50*l.* a year to be laid out in bread for the poor of a parish was held liable to the legacy duty, although the poor were so numerous that no one received more than the value of 2*s.* a-year. (b)

(a) *A. G. v. Jackson*, 2 Cr. & J. 101.

(b) *In re J. Franklin's Charity*, 3 Sim. 147.

CHAPTER IV.

OF THE REGISTRATION OF RENTS AND ANNUITIES.

THESE duties have been imposed for the purpose of raising a revenue for the expenses of the state; the other formalities which are required in these contracts are for the prevention of fraud, and the protection of parties from oppression and imposition. They consist in the Registration and memorialising of the grant and its contents. This Registration is twofold; the first applies to rents only, when charged upon certain particular lands, the other is of general application in the cases of personal annuities.

In regard to the first, by the statute 2 Ann. c. 4, it is enacted, that a memorial of all conveyances and deeds, and of all devises and wills of or concerning or affecting any lands, tenements, or hereditaments in the West Riding of the County of York, shall be registered in a register, and in a form thereby appointed, and in case such memorial be not registered, any such deed, conveyance, or devise shall be void against any subsequent purchaser or mortgagee for valuable consideration. By stat. 6 Ann. c. 35, a similar provision was made for the East Riding of Yorkshire, and the town and county of Kingston upon Hull. By statute 8 Geo. II. c. 6, similar provision was made for the North Riding. And by stat. 7 Ann. c. 20, the same was made for lands in the county of Middlesex.

Land Registry
Acts for rents
secured on lands
in Yorkshire
and Middlesex.

Under these statutes, where a rent charge is granted out of any lands, tenements or hereditaments, situate in either of the counties of York and Middlesex, a memorial thereof must be registered, according to the form and at the places specified in those acts, otherwise such grant will be void

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The acts do not
apply where
there has been
notice of the
charge.

against any subsequent purchaser or mortgagee of the lands charged.

But as the real object of these acts was to afford notice that the lands were subject to the incumbrance, which is registered, it has been held in equity, that where the subsequent purchaser or mortgagee has had notice, express or implied, of any such incumbrance, though the same have not been registered, yet he shall not take advantage of these statutes, but shall be bound to admit the priority of the charge.

Thus in *Cheval v. Nicholls*, (a) one granted an annuity and charged it on lands in Middlesex; his agent, who knew of the deed, and had paid part of the annuity to the grantee, afterwards purchased the land. The deed not having been registered, the purchaser refused to pay the rent. But on a bill filed in the Exchequer he was decreed to pay it, on the ground that he had notice of the prior incumbrance, and that it was contrary to equity that a person who had full knowledge should be relieved against a prior purchaser.

These acts do not, therefore, altogether invalidate the grants, since they are left in full operation and effect against the grantor, and are even available against subsequent purchasers who can be affected with a knowledge of the charge. But the important statutes, to which it will be necessary to devote great attention, apply to annuities and rents charged on lands in every part of England and Wales, where the consideration is pecuniary, and if their provisions be not attended to, render the grant wholly void. Without discussing the historical details regarding those statutes, which have been already stated in the Introductory Remarks, it may be observed that their general object and intent have always been understood to be, the prevention of the clandestine execution of contracts too frequently entered into by needy and incautious men on the one side, and artful and extortionate money-lenders on the other.

(a) 2 Eq. C. A. 64; 1 Stra. 664.

The first statute which requires the registration of the memorial of an annuity is the 17 Geo. III. c. 26, a portion of which applies to this part of the subject. That statute, except as to existing annuities, was repealed by the 53 Geo. III. c. 141, and many alterations were made in the regulations imposed by the former act. It has been found necessary to explain this latter act, and by the 3 Geo. IV. c. 92, and 7 Geo. IV. c. 75, to correct some interpretations which the courts had given to it. As, however, the 17 Geo. III. c. 26, is still in force as to annuities granted before the statute 53 Geo. III. c. 141, and as many of the decisions thereon may still afford an elucidation in cases on the latter, it will be advisable to commence with that act, and record, as briefly as possible, the interpretations which the courts put upon its enactments.

Those clauses which applied to the memorial of the annuity were the 1st, 2d, and 5th.

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The Annuity
Registration
Acts.

1st Act,
17 G. III. c. 26.
s. 1.

The 1st section, after reciting that, whereas the pernicious practice of raising money by the sale of life annuities hath of late years greatly increased, and is much promoted by the secrecy with which such transactions are conducted, enacts, that a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, shall within twenty days of the execution of such deed, bond, instrument, or other assurance, be enrolled in the High Court of Chancery, and that every such memorial shall contain the day of the month, and the year, when the deed, bond, instrument, or other assurance bears date, and the name of all the parties, and for whom any of them are trustees, and of all the witnesses; and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations of granting the same; otherwise every such deed, bond, instrument, or other

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The transaction,
if it be an
annuity in
effect, must be
memorialised.

The instruments
whereby it is
secured must be
enrolled.

assurance shall be null and void to all intents and purposes.

Although passed in the middle of the session, it was held to relate to the first day thereof, and therefore to affect an annuity granted before the actual date of the passing of the act, but after the first day of the session.(a)

The statute enacted, that a memorial of every deed, instrument, or other assurance, whereby any annuity should be granted, should be enrolled. On these words it has been decided, that where the transaction amounts in fact to an annuity, though there be no actual grant, it must be memorialized. As where the dividends of stock are assigned to secure an annuity, there must be a memorial of such transfer.(b) If, indeed, it be a sale of the dividends only, and cannot be considered as an annuity, no memorial is required.(c) Upon this, however, the reader is referred to Chap. I. p. 6.

It must be, however, a perfect grant, and not a mere agreement or contract to grant an annuity, for this does not require a memorial. As is exemplified by *Jackson v. Lever*,(d) where there was a contract to grant an annuity in payment of the purchase money of an estate, and the grantee died before the grant was executed; it was held that this, being merely a covenant to grant, was not within the act, and did not require a memorial. And a similar decision was given in *Nield v. Smith*.(e)

Not only the instrument by which the annuity is granted, but also that by which it is *secured*, must be memorialised. According to the language of the Court, in *Hood v. Burlton*,(f) "All manner of instruments calculated to secure the payment of an annuity are comprehended within the act." Hence a bond securing the payment of the annuity, and a judgment for the like purpose, fall within it. And it

(a) *Latliff v. Holmes*, 4 T. R. 660.

(b) *Hood v. Burlton*, 4 B. C. C. 121.

(c) *Duff v. Atkinson*, 8 Ves. 581; *Brown v. Like*, 14 Ves. 302.

(d) 3 B. C. C. 604.

(e) 14 Ves. 491.

(f) 4 B. C. C. 121; 2 Ves. J. 28.

was held, in *Hopkins v. Waller*,^(a) that a warrant of attorney, authorising a judgment to be entered up as a security, must be inserted in the memorial; for it fell expressly within the words *deed or other instrument*. On the authority of this case, the Court of Common Pleas also decided the same point in the same manner,^(b) and the Lord Chancellor Thurlow, after great deliberation, confirmed these decisions, in a judgment upon the latter case, which came before him. At the same time, if the warrant of attorney were memorialised, it was not necessary to insert the judgment entered up thereon. The Court said that the act would be complied with by registering all the securities given by the parties, and that no reliance was placed on the judgment. If, indeed, the judgment had been the only security, perhaps it would have come within the provisions of the act, but that was not the case.^(c)

So also in *Duff v. Atkinson*,^(d) where the dividends on stock, standing in the name of trustees, were charged with the payment of an annuity, and the trustees executed a power of attorney to a banker to receive the dividends and pay the grantee, and also covenanted not to revoke this; the Lord Chancellor Eldon held this power of attorney to be a substantial security which required enrolment.

Not only the securities given by the grantor himself must be enrolled, but also those given collaterally by third parties as sureties. "If not," as was said by the Court in *Rosher v. Hurdiss*,^(e) "wherever fraud was intended, some nominal person would be brought forward as the ostensible party; and the real security would be concealed from the public eye." But this principle is limited to the grantor's interest; every security given by him, or on his behalf, and for which the money received by him is the consideration, must be enrolled; but any collateral promise or

The securities
given by sureties
must be
enrolled.

(a) 4 T. R. 463.

(b) *Davidson v. Lord Foley*, 2 H. 1. 12; 3 B. C. C. 599.

(c) *Sherson v. Oxlade*, 4 T. R. 824; since supported by *Richardson v. Tomkies*, 9 Blag. 51.

(d) 2 Ves. 577.

(e) 5 T. R. 678.

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guarantee by a third person, unknown to him, as by an agent, who received a commission for such assurance, is unconnected with the interest of the grantor, and does not require enrolment.(a)

Where an annuity, having been granted, is duly memorialised, any additional security subsequently given, as, for instance, the deposit of a lease, need not be registered. The annuity continues valid, and the grantee may resort to this security.(b) This is also strongly illustrated by the case of *Aston v. Gwinnell*,(c) where two annuities were granted and secured on certain property, and memorials of these grants were duly registered, but on the grant of a fresh annuity these were also charged on an additional security, and the grantor also executed covenants for extra insurance; no fresh memorials were, however, registered of the two first annuities. The Chief Baron Alexander held that they were not requisite, neither was it necessary that the memorial of the last annuity should notice the other grants.

An assignment
of an annuity
requires
enrolment.

The statute used the word *granted*, and that has been extended to include the *securities*, but it has been a subject of much doubt whether it also extends to *assignments*. In the *Duke of Bolton v. Williams*,(d) Mrs. Williams was the grantee of a rent charge, amounting to a certain sum, parts of which she assigned by separate instruments to two other persons. The original rent charge was not within the act, but no sufficient memorial of the assignments had been enrolled. It was contended, however, that the assignments of the parts of an existing annuity differed from the grant of an annuity, and that the act of parliament did not therefore apply; but both Lord Thurlow and Lord Loughborough held the assignments to be void for want of enrolment. In *Grant v. Foley*,(e) Lord Loughborough, in the Common Pleas, had holden that an assignment existing at the time when the original grant was registered,

(a) *Sandilands v. Marsh*, 2 B. & A. 673.

(b) *Ex parte Price in re Palmer*, 3 Madd. 132; S. C. Buck, B. C. 221.

(c) 3 Y. & J. 136. (d) 4 B. C. C. 297. (e) *Hunt's Ann. C.* p. 38,

should also have been inserted in the memorial. But in *Bromley v. Greathead*,^(a) where the deeds of the original grants had been duly enrolled, and the grantees afterwards assigned, the Court of King's Bench expressed a strong opinion that there was no necessity for the enrolment of the assignment. *Grant v. Foley* was cited, but was distinguished by Grose, J., because in that case the assignment existed at the time of the registration of the memorial. The case of the Duke of Bolton v. Williams appears to have been finally decided after this case, and corresponds in its circumstances with *Greathead v. Bromley*, inasmuch as there was no necessity for enrolment of the rent charge; and therefore it is the same as though it had been duly enrolled. In a subsequent case, however, of *Dixon v. Birch*,^(b) the Court of Common Pleas held that the assignment, after due enrolment of the original grant, did not require a fresh memorial. It is stated that the Court determined this after argument, but the note of the case is very short, and it does not appear that the Duke of Bolton v. Williams was cited. No case is reported as having since occurred where this point has been discussed, but the general opinion seems to be, that if an annuity has been duly memorialised, no subsequent assignment thereof by the grantee need be enrolled. Mr. Plowden,^(c) indeed, draws a distinction between the assignment of the whole annuity and that of a part only, in which latter case he thinks, on the authority of the Duke of Bolton v. Williams, there ought to be a memorial, because it then operates as a fresh grant. If, indeed, that be the result of the whole transaction, as certainly it was in that case, he may be right, but there is nothing to show that the assignment of part of an annuity will in all instances amount to the grant of a new annuity by the assignor.

Whatever doubt there may be about an assignment, there is none where the transaction amounts to a regrant. In that case there must be a new memorial. This appears

A regrant must
be registered.

(a) Hunt's Ann. C. 45.

(b) 2 H. Bl. 307.

(c) F. 364.

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from *Hammond v. Foster*.^(a) There an annuity granted by A. to B., and regularly registered, was redeemed by virtue of a clause of redemption; the deeds were delivered up to the grantor uncanceled, and he and the attorney for the grantee agreed that, if at any future time the former should wish to borrow money on the same terms, those deeds should be given as a security. On a subsequent application by the grantor, the attorney advanced the same money on having the same deeds delivered to him. This was held by the Court of King's Bench to be a new grant, and to require a memorial.

Whether a fine
ought to be
memorialised.

Whether a fine levied by the grantor be an assurance within this clause, so as to require to be memorialised has not been settled. In *Craufurd v. Caines* ^(b) there had been a fine levied to secure the assignment of a rent charge, agreeable to the assignor's covenant, but there was no memorial of the fine, nor of the covenant to levy it. On a summary application to the Court of Common Pleas, by the grantor to vacate the fine, because it had not been inserted in the memorial, that Court refused to interfere. First, because they had no jurisdiction over the matter; and, secondly, because it was not such an assurance as was meant by the 3d section, according to the report, but it ought to be read 1st section, on which alone the question was raised. Afterwards the point was solemnly argued in a case of *Bradford v. Burland*,^(c) where the memorial contained the grantor's covenant to levy a fine, and also set out a fine as having been levied, but stated it erroneously. It was a case sent by the Master of the Rolls for the opinion of the Court of King's Bench, and contained many other points besides this; the late Chief Justice of the King's Bench argued for the grantee, and contended that it was not necessary that the fine should be memorialised. It was similar to a judgment, which it had been determined in *Sherston v. Oxlade* ^(d) need not be registered. The inclination of the Court, as elicited during the argument, seems to have

^(a) 5 T. R. 635.

^(b) 2 H. Bl. 438.

^(c) 14 East, 445.

^(d) 4 T. R. 824.

been, that the fine should have been registered—at least, that if registered, the memorial should be correct; and they certified that the memorial was defective, but it does not appear on what ground their opinion was formed. It should be observed, that the fine in this case was levied before the memorial was registered. The fine, indeed, is not properly an assurance of the annuity, but of the property on which it is charged, and it is not necessary to register what constitutes the title to the grantor's estate, as will appear shortly hereafter.

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As a farther illustration of the meaning which the Courts have put on the words of this section, it is right to refer to *Ex parte Mackenzie*,^(a) where the Court of Common Pleas held, that where a grantor, to secure the annuity, agreed to execute a will in favour of the grantee, and deposit it with the grantee's attorney, and did so, it was a security which ought to have been memorialised.

It has been already observed that the collateral securities which only affect third persons, who are not the direct parties to the grant, need not be enrolled; so also the instruments, which merely secure to the grantor the property which he charges with an annuity, do not require to be registered. This was held in the cases of *O'Callaghan v. Ingleby*, and *Henderson v. Countess of Glencairn*. In the former,^(b) a tenant for life conveyed his estates to trustees, in trust to raise money by way of annuities on his life; and afterwards he and his trustees granted an annuity by deed, reciting this conveyance; it was held unnecessary to insert this deed of conveyance in the memorial. Lord Ellenborough says, "it might never have been followed by the grant of an annuity at all, or not till after a long interval, and until some annuity be granted it cannot be necessary to enrol a memorial of it; but before that time shall arrive, the period may have expired within which, by the terms of the annuity act, a memorial of such deed is required to be enrolled." In the latter,^(c) the Court

Instruments which secured the property charged did not require enrolment.

(a) 4 Taunt. 323.

(b) 9 East, 135.

(c) 2 Taunt. 235.

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REGISTRATION.

of Common Pleas fully supported this case. There an annuity bond was assigned to secure another annuity of less amount, which was duly enrolled, but the original memorial of the former was defective, and the description of it in the second memorial was inaccurate. The Court however held that the grant of the second annuity was not affected thereby, because this was no assurance of that annuity, but only of the property on which it was secured.

The statute did not apply to acts done after the time of registration.

The statute only applied to instruments in existence at the time of the memorial, and did not extend to acts done afterwards. Therefore, where a copyhold estate was surrendered to secure an annuity, it was not necessary to enrol a memorial of the admittance.^(a) This may be another reason why there need not be a memorial of a fine levied to secure an annuity pursuant to a covenant in the annuity deed. This latter must have been registered within twenty days after its execution; but it could seldom have happened that a fine could be levied within that time; and though, as will be shewn hereafter, deeds may be registered before they are executed by all the parties, the same could not be done in regard to a fine.

How the separate instruments should be described.

When the act required that every deed should be memorialised, it has been interpreted to mean that all the securities shall be separately and distinctly inserted; and therefore, where an annuity deed recited that a bond and warrant of attorney had also been given to secure the annuity, and there was a memorial of this deed, in which the recital was set out, but not of the bond and warrant of attorney, the Court of Common Pleas held that the requisites of the act had not been complied with.^(b)

The description must be accurate.

The description of the instrument must have been accurate, as any material variance would have rendered the memorial invalid. Therefore, where certain dividends were assigned to I. H. on trust, to pay 50*l.*, part thereof to L. G. for life, and 50*l.*, also part thereof, to E. H. for life, it was

^(a) Doe d. Naylor v. Stephens, 1 Pri. 38.

^(b) Van Braam v. Isaacs, 1 B. & P. 451.

held to have been inaccurately described, as an annuity of 100*l.* granted to I. H. in trust, to pay 50*l.*, part thereof to L. G. and 50*l.* other part thereof to E. H. It was, in truth, the grant of two annuities.(a) So a joint and several bond was misdescribed as a several bond.(b) But in a case where the bond was a joint and several bond, and the memorial stated that the obligors were bound, without saying jointly or severally, it was held not to be a fatal variance, since that which was an ambiguity on one part of the memorial was rendered clear by the expressions used in other parts of the same.(c) Lord Eldon, however, in the same case in equity, was not satisfied with the judgment of the Court of King's Bench. Again, where the annuity deed contained a power to redeem, on giving six months' notice, *terminating on one of the days of payment*, it was held inaccurately described in the memorial as a power to redeem, on giving six months' notice simply, without reference to the time when it must have expired.(d) And in *Duff v. Atkinson*,(e) Lord Eldon inclined to think, that a bond, securing the payment during the life of the annuitant, and providing for a proportionate payment up to the time of the death, was inaccurately described as a security during the life only.

At first it was deemed necessary to insert the *extent* as well as the nature of the security. And therefore it was held in *Horwood v. Underhill*,(f) that where a bond extended to bind the obligor's heirs, it was necessary to state that the heirs were bound. Upon this case *Denny v. Dupuis*,(g) *Purling v. Parkhurst*,(h) and other cases were decided, but a writ of error having been brought on the judgment of the Court of King's Bench in the first, it was decided in the Exchequer Chamber, that it was not neces-

The extent of the security need not have been set out.

(a) *Hood v. Burlton*, 4 B. C. C. 121 ; 2 Ves. J. 29.

(b) *Willey v. Cawthorne*, 1 East, 398.

(c) *Coare v. Giblett*, 3 East, 461 ; *Horwood v. Underhill*, 10 East, 121.

(d) *Tringham v. Bethune*, 2 Taunt. 429.

(e) 8 Ves. 583.

(f) 10 East, 123.

(g) 11 East, 134.

(h) 2 Taunt. 237.

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The grant must
be stated com-
pletely.

Clerical errors
will not inva-
lidate the me-
morial.

The time within
which the en-
rolment was
required.

sary to state the extent of the security; therefore, that the obligation on the heirs need not have been inserted, and the judgment was reversed.(a)

The memorial must have stated the instruments *completely*, that is, all that is necessary to constitute the grant of the annuity should have been set out, but no more was requisite. Therefore a covenant by the grantor to pay, did not require to be memorialised,(b) nor was it necessary to mention the estates charged,(c) nor the days of payment.(d) Where a warrant of attorney contained a defeazance, and a deed recited the warrant of attorney and the defeazance, there was a memorial of the warrant of attorney, but not of the defeazance, though there was of the deed and its recitals, and the Court held this to be sufficient.(e)

Not only an immaterial variance will not render the memorial invalid, but also where the errors are merely clerical, the Court will not interfere. As where a term of sixty-one years was stated to be for sixty-two, and the consideration as being 280*l.*, and afterwards it was averred that the said sum of 250*l.* had been duly paid, the errors were held to be merely clerical, and not calculated to mislead; and the annuity was not vacated.(f)

The statute provided that the enrolment should be within *twenty days* after the execution of the deed. This meant exclusive of the day of the execution.(g) And the time does not begin to run until the contract is perfected. As in *Symmons v. Mortimer*,(h) where part of the consideration money was paid by the grantee, and the securities for the annuity were renewed from twenty days to twenty days. A longer interval than twenty days having elapsed, a further sum was advanced, when the securities were again renewed, and a memorial was enrolled. This was held

(a) *Horwood v. Underhill*, 4 Taunt. 346.

(b) *O'Callaghan v. Ingleby*, 9 East, 135; *Dupuis v. Edwards*, 18 Ves. 358.

(c) *Ib.* (d) *Ince v. Everard*, 6 T. R. 545.

(e) *Jackson v. Lord Milsington*, 6 Taunt. 189; 1 Marsh. 533.

(f) *Ince v. Everard*, 6 T. R. 575; *Wyatt v. Barwell*, 19 Ves. 438.

(g) *Ex parte Fallon*, 5 T. R. 223. (h) 5 T. R. 139.

sufficient, on the ground that the whole transaction was continuing and incomplete until the last execution of the deeds.

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It must be noticed, however, that the grantee is not responsible for any delay in the Enrolment Office; it is enough for him to bring the deed in due time, and to leave it for enrolment when the officer can do it. If the Court find the record correct, they will be satisfied, and will not enquire farther.(a)

This section then proceeded to enumerate certain things which the memorial should contain, and according to the construction put upon this act, it was to contain a clear statement of the whole transaction between the parties. The whole contract was to be set out, the securities and the consideration. This construction proved very inconvenient, and rendered the repeal of the act necessary.

Requisites of
the memorial
under the former
act.

It required, first, that the memorial should contain the day of the month and the year when the deeds, &c. bore date. On this it was determined that where there were several instruments, and the date of one was set forth in the memorial, and the others were stated *as bearing even date therewith*, it was sufficient.(b) So where it was stated that a bond bore date *on or about* 14th May, the Court of Common Pleas held it sufficient, saying, if it bore date on the 14th, that was about the 14th; if it did not, the description would be bad; but the grantor did not deny that it was dated on the 14th.(c) In *Underhill v. Horwood*,(d) Lord Eldon observed that it may require argument, whether the legislature meant by the day of the date, the day of the execution. This point does not appear to have been raised on this act, but it will be seen that it has been settled on the later act.(e)

1st. The day of
the date.

It has also been held that there need not be any mention of the time when a trustee executes a deed.(f)

(a) *Garrick v. Williams*, 3 Taunt. 540. See also *K. v. Hopper*, 3 Pri. 495.

(b) *Doe v. Phillips*, 5 M. & S. 369.

(c) *Jackson v. Lord Milsington*, 6 Taunt. 189; 1 Marsh. 533.

(d) 10 Ves. 228.

(e) See p. 119.

(f) *Doe v. Holloway*, 1 Stark. C. 431.

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2nd, The parties.

The second requisite was the names of all the parties, which must have been distinctly stated. And therefore an annuity was set aside where the memorial stated that the consideration was paid to A. B. and C., *some or one of them*; though it also appeared that the money was paid on the same day that the deed was executed by all.^(a) The word parties did not however extend to the agents or attornies, and therefore where a warrant of attorney was given to secure the annuity, the names of the attornies mentioned therein did not require to be stated.^(b)

3rd, For whom any of them are trustees.

The third requisite was the names of the parties for whom any of them are trustees. Upon this part of the act there have been several decisions, and the meaning of the legislature seems to have been carried to an extent scarcely warranted by the words, for not merely the names of the persons really beneficially interested have been inserted, but it has also been required that all the different modifications of the trusts should be memorialised.

All the modifications of the trust must have been stated.

Thus in *Denn d. Dolman v. Dolman*,^(c) where the memorial stated that by a certain deed part of the consideration was paid to one "in trust as therein mentioned," and also that certain premises were demise to the same person "upon the trusts therein mentioned," it was held that the memorial was insufficient, for not setting out those trusts. Again, where the memorial omitted a trust, providing for the extra insurance, which might become necessary, in case the grantor quitted the kingdom, it was held insufficient.^(d)

Not only the trusts for the benefit of the grantee, but also those for the grantor's benefit, must have been inserted. Thus where an estate was conveyed to a trustee in trust to permit the grantor to take the profits until default in payment of the annuity, and then in trust for the grantee, the memorial stated it generally in trust for the

(a) *Vaux v. Ansell*, 1 B. & P. 224.

(b) *Browne v. Rose*, 6 Taunt. 124; 1 Marsh. 478.

(c) 5 T. R. 641.

(d) *Cummins v. Isaac*, 8 T. R. 183.

grantee, omitting the previous trust for the grantor's benefit, and it was held fatal. (a) It had been previously decided by the Lords Commissioners in the Court of Chancery, that a memorial was bad, which stated a trust to be for the payment of an annuity to Lucy, the wife of R. G. for her life, whereas the trust in addition was for her husband's life in case he survived her, which contingency, however, was not noticed. (b) In *Askew v. Mackreth* (c) it was determined by the opinion of all the judges in the House of Lords, that where the trustee was to hold until default of payment for the benefit of the grantor, with power to sell the premises or part thereof, if the annuity were in arrear for sixty days, the memorial was insufficient which described the trustee as a trustee nominated on the part of the grantee, without stating any of the trusts. One of the points also raised in *Bradford v. Burland* (d) was, that a party was appointed a trustee for the grantor till default of payment, and if default should be made for twenty days, then to raise and pay the grantee the arrears, the memorial, however, took no notice of the twenty days. The Court of King's Bench held the memorial to be bad, and seem to have thought this a fatal objection. The case of *Leycester v. Lockwood*, (e) which was decided by that same Court, whose judgment was affirmed in the Exchequer Chamber on a writ of error, fully confirmed these previous cases; and the principle was carried still farther, for it was held to be necessary to insert the terms and provisions of the trust in a case where the grantor had no legal interest in the funds charged, having already assigned them, though for his own benefit, and the assignees did not convey their right to the grantee.

But where the memorial stated a deed to have been executed on the trusts contained therein, and also on farther

(a) *Taylor v. Johnson*, 8 T. R. 184. *Desenfans v. O'Brian*, 3 East, 559.

(b) *Hood v. Burlton*, 4 B. C. C. 121; 2 Ves. jun. 29.

(c) 1 New R. 214.

(d) 14 East, 445.

(e) 1 M. & S. 527; 5 Taunt. 587.

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trusts enabling the grantee to levy the arrears out of the premises charged, on an affidavit that there were no other trusts, the Court of King's Bench held it sufficient. (a) And it has been said by Lord Ellenborough in *O'Callaghan v. Ingilby*, (b) that nothing in the deeds giving power of entry and distress which does not create a trust, need be stated in the memorial.

The strictness which the courts at first showed in the consideration of this part of the clause was subsequently somewhat relaxed, and the rule was qualified thus—that if the court could, from the statement in the memorial, discover for whom the party was trustee, and what was the nature of the trusts, they would consider the memorial sufficient. They would not presume other persons to be beneficially interested than appeared by the instruments laid before them, nor would they require the grantee to disaffirm the existence of other trusts. (c)

4th, The names
of the wit-
nesses.

The fourth requisite was the names of all the witnesses. It was not necessary to set out their names at length, it was sufficient if they were stated as they appeared in the deed. This has been decided by the Master of the Rolls in the case of *Phillips v. Const*, (d) after the decision of the Court of King's Bench upon the similar requisite in the 53 Geo. III. c. 141, which will be noticed hereafter; though that court had also previously refused to set aside this annuity on this objection.

So where several instruments had been executed to secure an annuity, and the memorial omitted the Christian name of one of the witnesses to one of the instruments, the objection was treated as of no importance. (e)

But it was necessary that it should have appeared distinctly who were the witnesses to each instrument; and,

(a) *Toldervey v. Allan*, 5 T. R. 480.

(b) 9 East, 150.

(c) *De Faria v. Sturt*, 2 Taunt. 225. *Brown v. Ross*, 6 Taunt. 124; 1 Marsh. 478. *Bleamire v. Barfoot*, 6 Taunt. 504; 2 Marsh. 204.

(d) 3 Russ. 267. *Const v. Phillips*, 4 D. & R. 344.

(e) *Watts v. Millard*, 5 T. R. 598.

therefore, a statement that all the instruments were attested by A. B. &c. or one of them, was insufficient. (a) And afterwards, in *Ex parte Mackreth*, (b) where the memorial stated that the securities were witnessed by four persons, it was held to mean that each was so witnessed; and as it appeared that these were attested by two only, the annuity was vacated. Where, however, the information could have been obtained from the whole of the memorial, if taken together, it was valid. Thus in *Orton v. Knight*, (c) a deed executed by A., B., and C., was stated to have been executed by A. and C. in the presence of E. and F., and that two other instruments were executed by A. and B. in the presence of the said E. and F., who were accordingly the subscribing witnesses to the execution of the three instruments respectively; this memorial was held valid. And in *Doe d. Naylor v. Stephens*, (d) a deed was executed by A. and B., who were the beneficial parties, and by C. and D., their trustees, and the same witnesses attested the execution of all; but the memorial stated only the attestation of the execution by A. and B., and did not refer to that of the trustees. It was nevertheless considered sufficient.

As to the mode of expressing the witness's name, it should be mentioned that where the memorial stated that the securities *were executed in the presence of J. C.* the Court of Common Pleas refused to set aside the annuity on an objection that this was not a statement that J. C. was the witness. (e)

The fifth requisite was the annual sum or sums to be paid. On this Lord Loughborough decided in the Duke of Bolton *v. Williams* (f) that where the grantee was to have 4*l.* 10*s.* per annum, and also 7*l.* 10*s.* per annum in addition as poundage, for the trouble he was to take in receiving a rent charge on which it was secured, and paying

5*th.* The annual amount.

(a) *Hart v. Lovelace*, 6 T. R. 471.

(b) 2 East, 563.

(c) 3 B. & P. 163. See also *Brown v. Rose*, 6 Taunt. 124.

(d) 1 Pri. 38.

(e) *Wallis v. Lade*, 4 Taunt. 761.

(f) 4 B. C.C. 297; 2 Ves. jun. 138.

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it over, it was in reality an annuity of 50*l.* and was inaccurately stated to be an annuity of 42*l.* 10*s.* It was also a question proposed by the House of Lords to the judges in the case of *Askew v. Mackreth*, (a) but not answered by them, whether an annuity of 2000*l.* payable half-yearly, with a rateable portion, in case of the decease of the annuitant, could be correctly stated to be the grant of one annual sum of 2000*l.*

6th, The name of the annuitant.

The sixth requisite was the name or names of the person or persons for whose life the annuity was granted. Only one case, *Ranger v. Earl of Chesterfield* (b) appears to have occurred on this point. There the grantor had executed a bond, a warrant of attorney, and a grant of a rent charge which recited the other two. There was a memorial of all three, but it only appeared from the memorial of the grant for whose life the annuity had been granted. This was, however, held to be sufficient by the Court of King's Bench.

7th and last, The consideration.

The seventh and last requisite was the consideration or considerations of granting the annuity, and created very great discussion. In consequence of the interpretation given to the general import of the clause, as requiring a clear statement of the whole transaction, various doubts arose, particularly with reference to this requisite. So many circumstances influenced the parties in different cases, that it became no easy task to state with accuracy what was the consideration of the grant. The courts too did not diminish the difficulty, but rather increased it, by the refinement which was introduced in the interpretation of this part of the clause.

Power of redemption formed a part thereof.

Thus it was determined in a variety of cases, that a power given to the grantor to redeem formed a part of the consideration, and required to be inserted, whether it was contained in the body of the deed, (c) or was indorsed

(a) 1 New R. 214.

(b) 5 M. & S. 12.

(c) *Harris v. Stapleton*, 7 T. R. 205. *Appleby v. Smith*, 3 Anst. 865. *Greaves v. Bainbridge*, 1b. 870, n. (b), *Dalmer v. Barnard*, 7 T. R. 250. *Dickinson v. Boyne*, 1 B. & P. 335. *Bromley v. Holland*, 5 Ves. 610. *Byne v. Vivian*, 1b. 604. *Byne v. Potter*, 1b. 609.

thereon in the form of a separate memorandum, (a) or was a separate contemporaneous agreement; (b) unless indeed, though intended at the time of the grant, it was not executed till afterwards (c). A concession for redemption, made subsequent to the original grant, and unconnected therewith, did not require insertion. (d)

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And for the same reason where a warrant of attorney given to secure an annuity, with a stay of execution for fourteen days after default of payment, was memorialised simply, without an express statement of the proviso, the annuity was set aside. (e)

In describing this power, it was held that the terms of it must have been stated in the memorial, and therefore that a reference to the deed as containing the notice, terms, and conditions of redemption, was improper. (f)

How the power
should be
described.

Where an agent made an agreement for the redemption, commencing the written document in his own name, and signing it as agent for his principal, the memorial, containing a statement that it was made by the principal through his agent, was held valid. (g)

It was also considered that the expenses incurred in the grant, the brokerage and the law charges, formed part of the consideration. Mr. Plowden (h) has contended very strenuously for this position, and it cannot be denied that they ought not to be neglected in a transaction of this kind. But the courts did not go the length proposed by that learned author. They drew this distinction:—Where the expenses were paid out of the consideration-money at the time it was advanced, and no previous agreement by the parties was proved, then the consideration was so far dimi-

The expenses of
the grant when
part of the con-
sideration.

(a) *Steadman v. Purchase*, 6 T. R. 737.

(b) *Cator v. Hoste*, 2 B. & P. 559.

(c) *Dalmer v. Barnard*, 7 T. R. 250.

(d) *Booth v. Druce*, 4 Taunt. 252.

(e) *Cunningham v. Mackenzie*, 2 B. & P. 598.

(f) *Ex parte Ansell*, 1 B. & P. 62. *Cunningham v. Mackenzie*, 2 B. & P. 598. *Orton v. Knight*, 3 B. & P. 153.

(g) *Cator v. Hoste*, 2 B. & P. 557.

(h) *Ann.* p. 331, 384.

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nished, and the reduction ought to have been noticed in the memorial; but where there had been a previous agreement that the grantor should pay the expenses, the amount thereof became a debt due from the grantor, and a payment of that sum out of the money advanced was not to be treated as a reduction of the consideration. (a) Accordingly Lord Eldon held a memorial sufficient which stated that the whole consideration was paid, and that out of it the grantor paid the expenses of preparing the securities and enrolling the memorial, pursuant to an agreement made on the treaty for the purchase, though the actual amount paid was not specified. (b)

Covenant not to go abroad.

Another instance in which the modification of the consideration was required to be stated, occurred in *Chawner v. Whalley*. (c) The grantor gave bonds by which he bound himself to pay a certain sum if he went abroad in a military capacity within three years after the grant, and the Court of King's Bench held, that these bonds formed a part of the consideration, and ought to have been inserted in the memorial.

As to the time of paying the consideration.

The time when the consideration-money was paid was not required to be stated, but it was thought that the time might be material, as forming part of the consideration itself, which would of course be affected by any delay of payment. But in a case where the memorial stated the payment to have been made on the 24th, and it appeared that the grantee paid over the money on that day to one of the grantors, but a surety not having executed the deed, the money was deposited at a banker's till the 26th, when, the deed having been executed, it was paid out to the grantors, the memorial was held to be correct, and the consideration was not affected. (d)

(a) *Duke of Bolton v. Williams*, 4 B. C. C. 297; 2 Ves. J. 138. *Byne v. Potter*, 5 Ves. 609. *Mouys v. Leake*, 8 T. R. 411.

(b) *Davis v. Duke of Marlborough*, 2 Swa. 164.

(c) 3 East, 500.

(d) *Coare v. Giblett*, 4 East, 85. *S. C. Underhill v. Horwood*, 10 Ves. 206, and *Ware v. Horwood*, 14 Ves. 28.

And also where the memorial expressed that the consideration was paid on the 4th July, 1798, the day of the date and execution of the deeds, and it appeared that they were executed by a surety at Caermarthen; where he lived, then sent back and executed five days afterwards by the principal in London, it was held by the Master of the Rolls, and afterwards by the Lord Chancellor on appeal, to be correct. (a)

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Neither was it necessary to state by whom the consideration was paid. (b) Lord Loughborough indeed, in one case, (c) is reported to have said that the statute required that the memorial should set out by whom the consideration was paid, and to whom and on whose behalf:—this section has not such a requisite; but the third section, which will be seen hereafter, makes some such a provision in reference to the deeds, and hence it has been supposed that in the report of this judgment the words ought to be “the deed,” and not “the memorial.”

Not necessary
to state by
whom paid.

The omission of a nominal consideration, as of 10*s.* to a trustee, was immaterial. (d)

Some questions also arose as to the manner of describing the consideration, and what was paid. It was held sufficient if it were stated by way of recital only, and not positively. (e) And it was only necessary to state the consideration once, though it were inserted in several instruments, provided there were a clear reference from one to the others, so that the consideration for each appeared either expressly or by express reference. (f)

Manner of
describing the
consideration.

Of course the consideration should have been truly and accurately described, and several annuities were set aside because the consideration was stated inaccurately. Thus where it consisted partly of a sum of money and partly of

The considera-
tion must be
stated accu-
rately.

(a) *Phillips v. Crawford*, 9 Ves. 214; 13 Ves. 475; 1 N. R. 141.

(b) *Ex parte Ansell*, 1 B. & P. 63, n. (a).

(c) *Duke of Bolton v. Williams*, 4 B. C. C. 297; 2 Ves. J. 138.

(d) *Ince v. Everard*, 6 T. R. 545.

(e) *Sewerby v. Harris*, 4 T. R. 494. *Hodges v. Money*, *Ib.* 500.

(f) *Saunders v. Hardinge*, 5 T. R. 9.

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the release of a former annuity; (a) where notes previously given by the grantor were cancelled; (b) and where it was made up of money, a respondentia bond, and the charge for the expenses; (c) in all these cases the memorials were held to be defective, which stated the consideration to have been a certain sum of money.

It was decided that banker's checks, or promissory notes, could not be stated as money, but they should have been set out, and the time when they were payable. (d) This was even held in a case where the grantor had had his option of money or notes, and preferred the latter. (e)

But notes of the Bank of England were considered as money, and their description as such was not wrong. (f) And where checks were cashed before the grant was completed, the consideration might be stated to be money. (g) In *O'Callaghan v. Ingilby*, (h) the memorial stated that the sum of 1800*l.* was paid by the grantee to the grantor's trustees, by his draft on Messrs. R. & Co. his bankers, at or before the sealing and delivery of the same indenture, and of the said bond; the Court of King's Bench held that it might fairly be understood to mean that the money, and not the draft only, had been paid.

In one case a sum of money was advanced, and the securities were executed from twenty days to twenty days, and having been renewed, a fresh sum was advanced, the annuity increased, and the consideration stated in the securities also increased. They continued to be cancelled and renewed until at last they were enrolled, and the consideration was stated to be the whole sum advanced, no notice being taken of the cancelling of the former deeds;

(a) *Wasburn v. Birch*, 5 T. R. 472.

(b) *Kirkman v. Price*, 1 H. Bl. 309. *Byne v. Potter*, 5 Ves. 609.

(c) *Fenner v. Evans*, 1 T. R. 267.

(d) *Rumball v. Murray*, 3 T. R. 268; *Byne v. Vivian*, 5 Ves. 604; *Berry v. Bentley*, 6 T. R. 690; *Poole v. Cabanes*, 8 T. R. 328; *Drake v. Rogers*, 2 B. & B. 19.

(e) *Morris v. Wall*, 1 B. & P. 208.

(f) *Wright v. Read*, 3 T. R. 554; *Cousins v. Thompson*, 6 T. R. 335.

(g) *Ex parte Michell*, 2 East, 137.

(h) 9 East, 135.

this was held to be sufficient.(a) So also in Cheek v. Towers,(b) the consideration stated in the memorial was the delivery up of a bond, and the discharge of the debt secured thereby; the refusal by the grantee to deliver up the bond did not invalidate the memorial.

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Where part of the consideration money was paid over to a third person, with the consent, or by the directions of the grantor, or where a creditor gave a receipt for any portion of the debt due to him, it was necessary that the whole transaction should have been so stated; and it was not enough that the consideration should have been expressed to have been such a sum of money advanced,(c)

These were the requisites imposed by the statute, and were thus construed by the Courts. It is next to be considered what was the consequence of the non-observance thereof. The statute proceeded to enact, "That, in default of the memorial, *every such* deed, bond, instrument, or other assurance shall be null and void." Some difference of opinion prevailed as to the extent of these words, where one only of several instruments was not duly memorialised. In *Ex parte Chester*,(d) the Court of King's Bench held, that the penalty imposed by the statute was confined to the particular instrument; and a previous case of *Willey v. Wheeler* was cited, where there had been the same decision. But in *Duke of Bolton v. Williams*,(e) Lord Loughborough decided that a defect in the memorial of one instrument rendered them all void. Lord Kenyon referred to this decision in *Hart v. Lovelace*,(f) and expressed the strong inclination of his opinion the same way, though it was not necessary for him to decide the point there, as all the instruments were defectively memorialised. But in the case of *Brown v. Rose*,(g) Gibbs, C. J., in delivering the opinion of the Court of Common Pleas, said, "though it was held in the case of the Duke

The consequence of not observing the requisites of this act.

Defect in the memorial only affects the one instrument defectively memorialised.

(a) *Symmons v. Mortimer*, 5 T. R. 139.

(b) 1 Taunt. 372.

(e) 4 B. C. C. 297; 2 Ves. J. 138.

(c) *Watts v. Millard*, 5 T. R. 595. (f) 6 T. R. 471.

(d) 4 T. R. 694.

(g) 6 Taunt. 139.

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of *Bolton v. Williams*, that a defect in one of the instruments affected all, we cannot think that such was the intention of the legislature. We think it was only meant that the want of the prescribed observances should vitiate the particular security, for on looking into the act it appears there may be different memorials of the different deeds, and that the deeds may be executed at different times, and therefore we think the intent is, that only the particular assurance shall be void, with respect to which the requisites of the statute are not complied with."

This decision may be thought to have removed the doubt, and is confirmed by the declaratory act, 3 Geo. IV. c. 92, s. 2, which will be brought forward hereafter.

Meaning of the word *void*.

On the meaning of the word *void*, it was decided that every instrument not duly memorialised was absolutely void, and not merely voidable.(a) Even where it contained other matters, and only in part referred to an annuity, still it was held altogether void. As a consequence, the creation of a term to secure the grant of a rent, which was not duly enrolled, did not work a forfeiture on a covenant not to alienate.(b)

Who may avoid the instruments.

Not only the parties to the instruments themselves might avoid them, but third parties also could avail themselves of the objection. Thus a sheriff was justified in returning no effects in a case where the debtor was in possession of goods as a consideration for an annuity, which had been granted to him, but which had not been enrolled, on the ground that the property in the goods had not passed to him, the annuity being void.(c) And thus also an execution creditor, who had lost his priority by a judgment entered up on a warrant of attorney, granted to secure an annuity, where one of the instruments of the assurance was not duly registered, applied to the Court of King's Bench to vacate the judgment on this objection, and the application was granted.(d)

(a) *Saunders v. Hardinge*, 5 T. R. 9; *Crossley v. Arkwright*, 2 T. R. 603.

(b) *Denn v. Dolman*, 5 T. R. 641. (c) *Crossley v. Arkwright*, 2 T. R. 603.

(d) *Saunders v. Hardinge*, 5 T. R. 9,

In an anonymous case in 2 Chitty's Rep. 34, it is said that this section of the act is imperative. And, therefore, where the grantor had himself requested that the memorial might be omitted, he was still allowed to avoid the annuity for such omission. See also *Nash v. Godmond*. (a)

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Thus far of the 1st section; the 2d applied to the case of annuities granted before the passing of the act, and enacted "That before any judgment should be entered of record upon any warrant of attorney, for recovering or securing the payment of any annuity or rent charge that had already been granted, for one or more life or lives, or for any term of years or greater estate determinable upon one or more life or lives, and before any execution should be sued out or action brought on any such judgment already entered, or on any deed, bond, instrument, or other assurance already executed for the purposes aforesaid, a like memorial of the deed, bond, instrument, or other assurance should be enrolled in the High Court of Chancery, and in case the party should neglect to enrol the same, any such judgment, execution, or proceeding in the action respectively, should be null and void."

2d section of
17 Geo. III.
c. 26.

The effect of this clause was, not to annul or vacate the assurances then existing, but only to prevent any proceeding upon them before they had been registered. The party might at any time have complied with the act. Acting upon this opinion in a case where a bond and warrant of attorney, given before the act to secure an annuity, had been accidentally lost, Lord Alvanley, Master of the Rolls, allowed the grantee to recover the arrears without registration, comparing this to the case where a Court of Equity relieves when deeds are lost. (b) But where a bill was filed by the grantees of an annuity, granted before the act, for an account, and it appeared that the memorial was defective, the Lord Chancellor refused to allow the cause to stand over till a new memorial was enrolled. (c)

The revival of a judgment by a scire facias was con-

(a) 1 B. & Ad. 634.

(b) *Toulmin v. Price*, 5 Ves. 235.

(c) *Davidson v. Foley*, 3 B. C. C. 598.

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The later annuity acts.

sidered by the Court of King's Bench to be an action and proceeding within this clause, and was set aside, as well as the execution issued thereon, a memorial not having been enrolled. (a)

The consideration of the 5th section of the 17 Geo. III. c. 26, being deferred for the present, the provisions of the subsequent statutes relative to the memorial, and the interpretations which have been made upon them, will now be detailed. The 53 Geo. III. c. 141. s. 1, 2, 3, and 7, the 3 Geo. IV. c. 92, and the 7 Geo. IV. c. 75, contain all that applies to the subject of the memorial. It is not necessary again to discuss the reasons which induced the legislature to enact the statute of the 53 Geo. III. c. 141. But a part of the judgment of Lord Tenterden, in the case of *Buckridge v. Flight* (b) may well be cited, as pointing out the great distinction between the former act and the present. "The question," he says, "arises on the construction of an act of parliament made for the protection of infants against fraud. The effect of the act, when its provisions are not complied with, is to defeat deeds solemnly executed, and therefore we ought not, in our construction, to go beyond the words of the enactment. The point in this case depends upon the sufficiency of a memorial. On a view of that instrument, and referring to the words of the statute, I think it contains all that is required by the legislature. It is not required that there should be a memorial *of the transaction*, but *of the instrument* whereby the annuity is granted and secured."

53G.III.c.141. The 53 Geo. III. c. 141, bears date the 14th July, 1813, and the first section, reciting, "That it is expedient that the 17 Geo. III. c. 26, should be repealed, and other provisions substituted in lieu thereof, enacts that the same shall be repealed, save and except so far as regards any annuities or rent charges, which have been granted before the passing of this act."

(a) *Fenner v. Evans*, 1 T. R. 267.

(b) 6 B. & C. 53.

The second section enacts, "That within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require,

Otherwise every such deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes."

The form given in this act, and incorporated with the above section, is on the next page, except that the numbers affixed to the columns are not in the statute, but are introduced for the convenience of reference.

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1.	2.	3.	4.	5.	6.	7.	8.
Date of Instrument.	Nature of Instrument.	Names of Parties.	Names of Witnesses.	Name or Names of Person or Persons by whom Annuity or Rent-Charge to be beneficially received.	Person or Persons for whose Life, or Lives, or Rent-Charge to the Annuity or Rent-Charge is granted.	Consideration, and how paid.	Amount of Annuity or Rent-Charge.
10th August, 1813.	Indentures of Lease and Release	A. B. of one part C. D. of the other part	E. F. of — G. H. of —	C. D.	A. B.	£100 paid in money, £500 paid in notes of the Government and Company of the Bank of England, or other Notes or Bills of Exchange, as the case may be.	£100 a year.
Same date.	Bond in penalty of £1200	A. B. to C. D.	E. F. G. H.	For securing the same Annuity or Rent-Charge.			
Same date.	Warrant of Attorney to convey judgment on the same Bond	A. B. to J. K. & L. M., attorneys of Court of King's Bench	E. F. G. H.				

The third section provides, "That if any such annuity shall be granted by or to or for the benefit of any company, exceeding in number ten persons, which company shall be formed for the purpose of granting or purchasing annuities, it shall be sufficient, in any such memorial, to describe such company by the usual firm or name of trade."

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Clear and distinct as these sections, with the tabular illustration, appear to be, many questions have nevertheless arisen, and have been decided with a more lenient interpretation than prevailed in former times on the older act. Those will now be detailed; but as most of the columns correspond with the requisites of the first act, it has been thought advisable that the reader should be referred to the previous decisions, which might elucidate the present enactments.

By the second section, the memorial is to be enrolled within *thirty days* after the execution of every deed, &c. This period, as will be recollected, is extended ten days beyond the previous act. See page 102.

The time of
registration.

It has been decided that, though the memorial must be enrolled within thirty days after the deeds have been executed, yet the enrolment may be made *before* they are executed, and will take effect from the execution. Therefore, where *after* the execution of the deeds by the grantee, and *before* that of the grantor, a memorial was enrolled, the Court of Common Pleas decided, that this was warranted by the statute; and the Court of King's Bench, on a writ of error, confirmed this judgment. (a)

The other points will be arranged in the order of the different columns of the table. The first is for the Date of the Instruments. Where there are several, the dates of all must be stated, if they differ; a mere reference is sufficient if they do not. Lord Tenterden, in his judgment in *Buckeridge v. Flight* (b) says, "There is a column for the date of the instrument; that must mean the day inserted in the

1st Column.
Date of the In-
strument.

(a) *Flight v. Buckeridge*, 3 Bing. 215; 11 Mo. 28; *Buckeridge v. Flight*, 6 B. & C. 53; 9 D. & R. 113.

(b) 6 B. & C. 53; 9 D. & R. 113.

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2nd Column.
Nature of the
Instrument.

instrument, as the date, and not the day, on which it is executed: for if there are several parties, it can seldom happen that all will execute the deed on the same day." Hence the doubt pointed out by Lord Eldon, in *Underhill v. Horwood*, will not arise on this act. See page 103.

The second column is for the Nature of the Instrument, and is new, not having been expressly required in the former act. The cases that have occurred upon it have necessarily been upon the description of the instrument. It has been determined by the Court of King's Bench that the act will be satisfied by a description of the instrument in popular language, although that be not according to its strict legal effect; and, therefore, where an underlease was stated in the memorial as an assignment, it was held sufficient. (a)

So where an annuity was granted by an indenture, which also contained a release of a previous annuity, it was held correctly described in the memorial as a grant of annuity. (b)

Mr. J. Bayley said, "Here there is nothing but the word 'grant' in the memorial, but I think the deed set out on oyer operates as a grant of an annuity, and that the word 'grant' is a proper description of the nature of the instrument, within the meaning of the act of parliament. The other columns will supply the names of the parties, the names of the witnesses, and the persons for whose lives the annuity is granted, and when that information is supplied, the grantor may claim his copy under the fifth section. He will then see whether he has a copy of the instrument described in the memorial, whether it is attested by the same witnesses, and whether it is granted for the life of the person there described."

Mr. J. Holroyd.—"I think it is not necessary to describe the deed as an indenture. It would make no difference if it were so described. If the word indenture were a

(a) *Butler v. Capel*, 2 B. & C. 251; 3 D. & R. 485.

(b) *Crowther v. Wentworth*, 6 B. & C. 366; 9 D. & R. 286.

material part of the description, the effect would be to prevent a party from having recourse to any other instrument."

And in a subsequent case of *Browne v. Lee*,^(a) it was held that an instrument, which contained, besides covenants to pay the annuity, also an assignment of stock, to secure the same, was sufficiently described as "a grant of an annuity." It was objected that the nature of the whole instrument ought to be set out, which was the distinction between this case and that of *Crowther v. Wentworth*. But Mr. J. Bayley, in his judgment, said, "The enacting clause does not in terms require the nature of the instrument to be described, but the schedule which follows this clause contains several columns, one of which is headed 'Nature of the Instrument,' and under that head there is given an instance of the description of the nature of the instrument which the statute requires, viz. 'Lease and release,' 'Warrant of attorney to confess judgment,' 'Bond in penalty.' *The statute imposes no obligation on the parties to describe the property on which the annuity is secured.* The object of the statute was that such a description should be given as to enable a party, on looking at the memorial, to claim a copy under the 5th section. The words 'grant of an annuity' are as true a description of the nature of an instrument by which an annuity is secured, as the words 'Lease and release.' They convey as much information as the legislature intended to be conveyed by the description of the nature of the instrument, within the meaning of this act of parliament."

Indeed so liberal is the construction which the courts have given to this act, that in a late case, ^(a) where the deed recited a contract to purchase an annuity to be secured out of the dividends of stock, and the grantor covenanted to pay the annuity, and assigned the dividends to the grantee, the memorial was held to be sufficient, which described the instrument to be an assignment of dividends, and an an-

(a) 6 B. & C. 689; 9 D. & R. 700.

(b) *Cañe v. Lovelace*, 2 B. & Ad. 767.

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3rd column,
Names of the
Parties.

nulty deed to secure the same. Parke, J. observed : " The nature and effect of the instrument are described, if not quite accurately, yet with as much particularity as the present statute requires, giving it the same latitude of construction as was used in *Butler v. Capel* and *Crowther v. Wentworth*."

The third column is for the Names of the Parties ; upon which see p. 104. The meaning of this term is explained by the case of *Flight v. Buckeridge*, where the deed was memorialised before one of the parties had executed ; and it was contended that that person was not a party until he had executed, and ought not to have been inserted in the memorial. But the Court of Common Pleas ^(a) decided against this objection, and on an appeal, the Court of King's Bench affirmed their judgment. ^(b) Abbott, C. J. in his judgment said, " It is contended that no person is a party within the meaning of the statute until he has executed the deed. It is true that he is not until that time a party chargeable, but still he may be a party ; and I take the expression in the statute to mean *all such persons as upon reading the deed appear to be parties*."

It was decided also in *Yems v. Smith*, ^(c) that the memorial need not express the party in whose favour a warrant of attorney has been given ; the schedule having pointed out the mode of memorialising a warrant of attorney, and not requiring this particular.

It will be recollected that where one of the parties is a company exceeding ten persons, formed for the purpose of granting or purchasing annuities, their usual firm or name of trade will be a sufficient description. See sect. 3. p. 119.

4th column,
Names of the
Witnesses.

The fourth column is for the Names of the Witnesses, and the examples given are E. F. of —, and G. H. of — ; and afterwards E. F. G. H. alone. The constructions put on this column have rendered two acts of parliament necessary to explain or correct it.

^(a) 3 Bing. 215 ; 11 Mo. 26.

^(b) 6 B & C. 53 ; 9 D. & R. 113.

^(c) 3 B. & A. 206.

In the first place, it was decided by the Court of King's Bench that the memorial should contain the whole of the christian name of the witness, the mere initial letter of the name not being sufficient. (a)

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But according to the opinion of the legislature this was not the correct interpretation of the statute, and an act of parliament accordingly was passed, the 7 Geo. IV. c. 75. to correct the effects of these decisions.

Explained by
7 G. IV. c. 75.

It begins by reciting the requisites of the stat. 53 Geo. III. c. 141. and continues to recite that "whereas it frequently happens that the names of witnesses to grants of annuities or other assurances are unknown to the grantees thereof, or their solicitors or agents, otherwise than as they appear by the subscriptions of such witnesses to the attestations of the execution of such grants or assurances; and it might greatly endanger the validity of any such assurance, if any name were inserted in the memorial thereof as the name of any such witness, in any other manner than as the same appears signed by such witness as attesting the execution of any such assurance; and whereas a very great number of memorials of grants of annuities have, since the passing of the said act, been enrolled, in which the surnames of witnesses to the deeds, instruments, or assurances specified in such memorials, have been inserted, together with such initial letter or abbreviation of the christian names of such witnesses as appeared subscribed to the attestation by such witnesses of the execution of such deeds, instruments, or assurances, without stating at full length the christian names of such witnesses; and whereas doubts have been entertained whether according to the true construction of this act it is necessary to the validity of any such grant or other assurance that the christian as well as surnames of all the witnesses to such deed, grant, or other assurance, should be inserted in the memorial thereof in any other manner than as the same may appear subscribed to the

The names of
the witnesses
are to be set out
as they appear
in the attesta-
tion.

(a) Cheek v. Jefferies, 2 B. & C. 1; 3 D. & R. 185. Metcalf v. Bowes; 5 B. & C. 268; 7 D. & R. 773. Doe v. Bromley, 6 D. & R. 292.

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attestation of such deed, grant, or other assurance, by such witnesses respectively; and in order to remove such doubts, it is enacted and *declared*, That by the said act of the fifty-third year of the reign of his said late majesty, no further or other name or names of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent charge is or may be granted, is or are required in the memorial thereof, besides the names of all such witnesses as they shall appear signed to the attestations respectively of the execution of such deed, bond, instrument, or other assurance, and so the said act shall be deemed, construed, and taken."

The other point in the construction of this column in which the Court of King's Bench, according to the opinion of the legislature, misinterpreted the statute, is so fully explained in the preamble to the act of 3 Geo. IV. c. 92. that it may well be set forth at length.

And by 3G.IV.
c. 92, no other
description of
the witnesses is
to be required
than their
names.

It is dated 29th July, 1822, and begins by reciting the requisites of the 53 Geo. III. c. 141, and continues, that "whereas the form or effect to which such enactment refers is expressed in several columns, at the head of one of which are the words "Names of Witnesses;" and underneath, as applicable to indentures of lease and release, the letters and words "E. F. of —" "G. H. of," and as applicable to a bond and warrant of attorney to confess judgment, the letters "E. F." "G. H." without the word "of;" and whereas the words of enactment referring to such form express only that a memorial of the names of all the witnesses to every such deed, bond, instrument, or other assurance as therein mentioned, should be enrolled as directed by the said act, without providing that any description of the witnesses should be given in such memorial, except as such form is thereby referred to, and such form does not provide that any description should be added to such names, except by the addition of the word "of" to the letters "E. F." and "G. H." as aforesaid as applicable to indentures of lease and release; and whereas, in consequence of such indistinct enactment it may be doubtful whether it was the intention of the

legislature to require any, or, if any, what description to be added to the names of witnesses in the memorial of any deed, instrument or assurance to be enrolled as aforesaid; and whereas a very great number of memorials of grants of annuities have, since the passing of the said act, been enrolled, in which the names of the witnesses to the deeds, instruments or assurances specified in such memorials have been inserted without the addition of the place of abode of such witnesses, and it has been inferred from the use of the word " of " after such letters " E. F. " and after such letters " G. H. " as aforesaid, that it was necessary to describe each of such witnesses in such memorial as of some place, and in consequence thereof some grants of annuities made since the passing of the said act, have been in proceedings in summary applications to courts of justice, which cannot be reviewed in any superior court, deemed null and void, on the ground that no description of the place of abode of the witnesses to some or one of the deeds, instruments or assurances by which such grants of annuities have been made, had been inserted in the memorials or memorial thereof enrolled as directed by the said act, and whereas doubts have been entertained whether the construction so put on the said act is the true construction thereof, more especially as the same is so far penal, as it renders deeds, instruments and assurances, of which memorials have not been enrolled in pursuance of the said act, null and void; and the provisions in the said act are not so clear and explicit as the same ought to have been under such circumstances, and the parties claiming under grants of annuities may have been thereby misled and induced to conceive that it was not necessary, under the provisions of the said act, to insert in the memorial of any deed, instrument or assurance to be enrolled as aforesaid, the place or places of abode of the witness or witnesses to such deed, instrument, or assurance, or any more than the name or names of such witness or witnesses, there being no words in the said act expressly requiring any more to be so inserted, nor any words from which it could be inferred that any more was required to be so inserted, except the word " of "

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after the letters "E. F." and "G. H." respectively, with reference to one species of assurance inserted in the form of the memorial before mentioned, and it is expedient to remove all doubts touching the construction of the said act with respect to so much of the memorials required by the said act to be enrolled, as relates to any description of the witness or witnesses to any deed, instrument, or assurance.

"It was therefore enacted and *declared*, that by the said act of the 53d year of the reign of his late majesty, *no further or other description of the subscribing witness or witnesses to any deed, bond, instrument or other assurance, whereby any annuity or rent charge is or may be granted, is required in the memorial thereof, besides the names of all such witnesses, and so the said act shall be deemed, construed and taken.*"

§ 4. *proviso.*

By the fourth section, however, it is provided "That the act shall not extend, or be construed to extend, to revive or give effect to any deed, bond, instrument or other assurance, whereby any annuity or rent charge hath been already granted, so far as the same hath been adjudged, declared, treated or deemed void by any judgment, decree, action, suit, or proceeding at law or in equity, or by any acts or deeds of the parties thereto, or by any other legal or equitable means whatsoever; nor shall this act affect or prejudice any suit or proceeding at law or in equity commenced on or before the 31st day of May, 1822, and now depending, upon the ground of an alleged defect in the memorial thereof, in not describing the witnesses thereto otherwise than by his, her or their name or names, for avoiding any such deed, bond, instrument or other assurance."

The cases alluded to in this statute are *Darwin v. Lincoln* (a) and *Smith v. Pritchard*. (b) In the former, the memorial contained in the witness column, the words "A. B." clerk of "Mr. B." and in the instrument attested, it appeared that Mr. B. lived in Cloak Lane. The Court of King's Bench held the memorial to be insufficient for want of the residence of the witness. And in *Smith v. Pritchard*,

(a) 5 B. & A. 444.

(b) *Ibid.* 717; 1 D. & R. 374.

the witness was described as "C. R. clerk to W. A. of G. M. Street, in the county of M. gentleman." The witness did not reside there, but only attended at the office. The same court held this also defective.

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But since this last act the case of *St. John v. Champneys* (a) came before the Court of Common Pleas, and there it was decided, that where a memorial contained the name and description of the witnesses thus, "T. J. D., J. F. C., clerks to Mr. E. H., of C. street, in the county of M." it was sufficient within the meaning of the act of the 53 Geo. III. c. 141. The declaratory act was referred to by the court in their judgment, though it was objected that the case was excepted by the proviso contained in the fourth section, the application having been made before the act was passed.

See as to this requisite on the former act, page 106.

The fifth column is for the name or names of the person or persons by whom the annuity or rent charge is to be beneficially received, and is in place of the requisite of the names of the parties for whom any of them were trustees, which led to so much intricacy of interpretation under the former act, as was shown above in p. 104. No doubt or difficulty has arisen on this column.

The 5th column
for the Name of
the Party bene-
ficially interest-
ed.

The sixth column is for the person or persons for whose life or lives the annuity or rent charge is granted.

The 6th column
for the name of
the annuitant.

It was objected to a memorial that where an annuity was granted for a term of years determinable on lives, no notice was taken of the term of years, but the lives only were inserted: 2dly, That no description nor residence was stated of the annuitants: and, 3rdly, That it did not appear whether the grant was for the joint lives or extended to that of the survivor. The Court held all these objections to be groundless; that a literal attention was all that was necessary to give to the statute, which had been done in that case. (b) See p. 108.

The seventh column is for the consideration, and how

The 7th column
for the consi-
deration.

(a) 1 Bing. 77; 7 Mo. 382.

(b) *Barber v. Gamson*, 4 B. & A. 281.

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Only the pecuniary consideration actually paid need be stated.

paid. In the introductory part of this section the pecuniary consideration is required to be set forth; and in the example given in the column, money, notes, and bills are mentioned; accordingly it has been decided that only the pecuniary consideration actually paid need be mentioned, and that it is not necessary to set out any collateral securities or circumstances which may affect the amount thereof. This is one of the great distinctions between the two acts. The reader cannot fail to remember the many decisions detailed above in p. 108 on this requisite in the former act.

Thus it was determined that a covenant by the grantor, not to go upon the seas, or to parts beyond them, without giving the grantee notice, so that the latter might be enabled to pay any additional premiums of insurance, if such should be incurred thereby, and also to pay the amount thereof to the grantee, did not require insertion in the memorial as part of the consideration, though it had been so held in *Chawner v. Whalley* (a) under the old act. The language of *Dallas, C. J.* may well be quoted in this place. "It is quite clear," he says, "that the object of the 53 Geo. III. c. 141, as well as the 17 Geo. III. c. 26, was to guard against fraud, and that it was therefore necessary to set out the sum actually paid for the annuity, on the one hand, and the amount of the annuity on the other. Here it is stated that the sum paid was 490*l.* in Bank of England notes, and that the amount of the annuity was 70*l.* a year. Both these are pecuniary payments. Is any thing collateral or contingent to be considered as part of the consideration or the annuity itself? It seems to me that it cannot on the reasonable construction of the statute. The grantee may or may not be put to any expense on the grantor's going abroad; it does not increase the value of the annual sum he is to receive. The consideration to be expressed must be confined to the sum paid for the annuity, and the statute points out how the consideration must be stated to have been paid; viz. 100*l.* in money, and 500*l.* in Bank of

(a) *Ante*, p. 110.

England or other notes, or bills of exchange, as the case may be. Besides, the statute is confined to pecuniary considerations." And Mr. J. Park observed: "The words 'how paid,' mean that the consideration must have been paid at the time of the enrolment, which must be made within thirty days after the annuity was granted, and cannot apply to any additional sum that may be payable on a contingency thereafter." (a)

This case has also been followed by another in the King's Bench, where certain dividends being assigned for the security of the annuity, the grantor covenanted that the grantee might retain any additional sum which might be required to meet the increased expense of insuring his life, if he went abroad, and farther covenanted to pay what might be wanting, if they proved insufficient. It was held that this covenant did not form such a part of the consideration as to require insertion in the memorial. (b)

Again, in *Morris v. Jones*, (c) certain policies of insurance on the life of the grantor were assigned to the grantee, whereby he was enabled to insure the life of the grantor at lower premiums than would have been payable if the life had been insured at the time when the annuity was granted. This was held to be ancillary to the grant, and, though it had not been inserted in the memorial, did not affect the validity of the annuity.

Lord Tenterden, in giving judgment, observed: "But it is said that the consideration for granting this annuity is not truly set out in the memorial, inasmuch as the sum of 11,000*l.* was paid, partly for the purchase of the annuity, and partly for the assignment of the policies, which had been effected some years before; and it is urged that the grantee, by such assignment, actually derived a present pecuniary benefit, because he was thereby enabled to insure the life of the grantor at a less annual premium than he otherwise could have done. Now when an annuity is

(a) *Wood v. Perrott*, 5 Mod. 63.

(b) *Cane v. Lovelace*, 2 B. & Ad. 767.

(c) 2 B. & C. 233; 3 D. & R. 263.

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granted for the life of the grantor, it is almost the invariable practice for the grantee to insure the life of the grantor, and in calculating the amount of the annuity, or the consideration to be paid, regard is always had to the terms on which the life can be insured. The amount of the premium depends upon the age of the grantor and the state of his bodily health, yet neither of those circumstances are ever mentioned in the memorial. And in this case the purchaser must be supposed to have paid something more for the annuity of 1429*l.* or to have received a smaller annual payment for that consideration paid, in consequence of his having the policies assigned to him, and being thereby enabled to insure at a less annual premium than he otherwise could have done. I think that we should introduce too much subtlety into the construction of this act, if we were to hold that this assignment ought to be stated in the memorial. We might next be called upon to set aside securities for an annuity, upon the ground that the consideration was calculated with reference to a representation of the bodily health of the party for whose life the annuity was granted, which representation afterwards turning out to be unfounded, the grantee was enabled to insure the life at a much less annual premium than that which the parties calculated as the amount of the premium at the time when the consideration was paid. I think this objection ought not to prevail."—It is stated, however, by Mr. Petersdorff, in his Abridgement, (a) that the Vice Chancellor held the annuity not to have been duly registered, since the assignment of the policy was a part of the consideration, and ought to have been set forth. Upon that decision he comments with some force and reason in support of it.

The Court of King's Bench have also decided that a

(a) Vol. I. 659. The author has searched the Registrar's books for 1822, 1823, 1824, and 1825, the years between the decision in the King's Bench and the publication of Mr. Petersdorff's Abridgement, but he has not found the Vice-Chancellor's decree. There is a case of *Morris v. Jones*, beginning in 1822, and concluded in 1823; but although the bill related to an annuity transaction, there is nothing to connect it with the present case.

clause for redemption need not be mentioned, as it forms no part of the pecuniary consideration. (a)

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The above case of *Cane v. Lovelace* (b) also affords another illustration of the meaning of this column. The defendant there had granted an annuity, and agreed with the plaintiff that the latter should pay it off, on its being assigned to him, and should make a farther advance, for which the defendant agreed to grant a fresh annuity to the plaintiff. The whole money, including the price of the previous annuity, was paid to the grantor, who returned what was necessary for the redemption to the grantee, and he immediately paid it over to the former grantee. In the memorial the consideration was stated to be so much money paid in Bank of England notes. It was objected that it was misdescribed, as it ought to have been stated as payment of part of the sum, and the redemption of a former annuity, and *Wasburn v. Birch*, (c) on the first act was cited. The Court however held the memorial sufficient. In reference to the case cited, Parke, J. observed: "There the whole transaction was between the parties to the annuity deed; the former annuity was to be given up by the grantee of the latter. Here, as between the parties, the consideration was 1050*l.*, no matter what was to be done with it afterwards. You confound *the purpose* with *the consideration*."

The eighth and last column is for the Amount of the Annuity or Rent Charge. As the example given is 100*l.* a year, there seems to be no room for the doubt mentioned as having been raised on the former statute, in *Askew v. Mackreth*, where the payments are made half-yearly, or at other periods, and a rateable sum is provided to be paid on the ~~decease~~ of the annuitant. (d) See, on this requisite, p. 107.

The 8th column
for the Amount,

As in the consideration, so the statement of the amount is not to be affected by collateral or contingent circumstances, not actually regulating it at the time of the grant. Thus a covenant to pay additional premiums of insurance,

Not to be
affected by con-
tingent or
collateral cir-
cumstances,

(a) *Yems v. Smith*, 3 B. & A. 206. (c) 5 T. R. 472; above, p. 112.

(b) 2 B. & Ad. 767.

(d) Page 108 above.

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in the event of the grantor's going abroad, does not require insertion as part of the amount of the annuity. (a)

With reference to the mode of stating the amount, although perhaps a mere clerical mistake, may not vitiate an annuity, yet where an annuity of 237*l.* was stated in the memorial in words to be 257*l.*, the Court of King's Bench held the error to be such as avoided the annuity deed. (b)

A covenant by the grantor to insure his own life need not be inserted. (c)

A penalty need not be inserted.

Here it is right to observe that the penalty in a warrant of attorney, given to secure the annuity, (d) need not be set out in the memorial. There is no column for it, and there is no notice taken of it in the description of the instrument given as example.

The consequence of not observing the requisites of this act.

In default of a proper memorial, the statute enacts that every such deed, bond, instrument, or other assurance, shall be null and void, in the same language as that used in the 17th Geo. III.; the question therefore arose, which had been so much considered on that act, as to the extent of this provision, when one of several assurances is not duly memorialised. As will be remembered, (e) the latest decisions had tended to restrict the avoidance to the particular instrument, and not to vacate all, according to the earlier opinion of the Courts, but as this point had never been expressly settled, the legislature in the act of the 3 Geo. IV. c. 92, already referred to, has provided for this question; and by section 2, reciting "that doubts have arisen whether, under the 53d Geo. III., the omission to enrol a memorial of any one of the assurances for securing any annuity or rent charge does not vitiate the whole transaction, notwithstanding the enrolment of a memorial of another deed, bond, instrument, or other assurance granting the same: and that it is expedient to remove such doubts, it is enacted and *declared*, that every deed, bond,

3 Geo. IV.
c. 92, s. 2.

(d) Wood v. Perrott, 5 Mo. 63. See also Cane v. Lovelace, above cited.

(b) Nash v. Godmond, 1 B. & Ad. 634.

(c) By Parke, J. in Cane v. Lovelace.

(d) Barber v. Gamson, 4 B. & A. 281.

(e) See p. 113.

instrument, or other assurance granting any annuity or rent charge, and of which a memorial shall have been, or shall be duly enrolled, pursuant to the said act, notwithstanding the omission to enrol any other deed, bond, instrument, or other assurance for securing such annuity or rent charge, shall be valid and effectual, according to the intent, meaning, and true effect thereof, notwithstanding a memorial of any other deed, bond, instrument, or assurance for securing the same annuity, shall not have been duly enrolled, pursuant to the said act."

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And section 3 provides that "nothing therein contained shall extend to give any other force or validity to any deed, bond, instrument, or other assurance of which a memorial shall have been duly enrolled as aforesaid, than such deed, bond, instrument, or other assurance would have had if any deed, bond, instrument, or other assurance for securing the same annuity of which a memorial shall not have been duly enrolled, had never been executed."

The statute having used the words "shall be void," the Courts have no discretion, but must vacate the instrument if the memorial be defective. (a)

The Courts have
no discretion.

It remains to be observed, that the memorial which is registered must be stamped. By stat. 44 Geo. III. c. 98, it is enacted, that the memorial for registering any original deed, or other instrument by which any annuity shall be granted, shall be charged with a duty of 1*l*. And by the stats. 48 Geo. III. c. 140, and 55 Geo. III. c. 184, the memorial to be registered or enrolled, pursuant to act of Parliament, of any deed or instrument, deeds or instruments, whereby any annuity shall be granted or secured in England, shall be charged with a duty of 1*l*.; and every piece of vellum, parchment, or paper, upon which such memorial shall be written, after the first, a further progressive duty of 1*l*.

The memorial
must be
stamped.

Such being the nature of the memorial required by these statutes of the grant of an annuity or rent charge, the

Certain offices
appointed to
receive the
memorials.

(a) *Metcalf v. Bowes*, 5 B & C. 258.

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legislature have provided proper offices for the enrolment of the memorial, and each act has made certain regulations for the guidance of the officers, which vary slightly in consequence of the different nature of the requisites of the statutes.

By sect. 5 of the 17 Geo. III. c. 26, it is enacted, "that a particular roll shall be provided, and kept by the clerks of the enrolments in Chancery, or their deputy, on which such memorials shall be entered, and that every such memorial shall be duly enrolled, in order of time, as the same shall be brought to the office, and the said clerks of the enrolments, or their deputy, shall specify upon the roll the certain *day, hour, and time*, on which such memorial is brought to the office, and shall grant a certificate of the enrolment thereof when required; and that there shall be paid for the enrolment of every such memorial the sum of one shilling, and no more, in case the same do not exceed two hundred words. But if such memorial shall exceed two hundred words, then after the rate and proportion of 6d. for every one hundred words, and the like fees for every certificate and copy given, and the fee of 1s. for every search in the office, and no more."

And by sect. 7 of the 53 Geo. III. c. 141, it is enacted, "that a particular book shall be provided and kept by the clerks of the enrolments in Chancery, or their deputy, in which such particulars as thereinbefore are mentioned shall be entered alphabetically, by the names of the grantors, in order of time as the same shall be brought to the office; and the said clerks of the enrolments, or their deputy, shall specify in the book the certain *day, hour, and time* on which such particulars are brought to the office, and shall grant a certificate of the entry thereof when required; and that there shall be paid for every such entry 20s. only, and the fee of 1s. for every certificate and copy given, and the fee of 1s. for every search in the office, and no more."

If the officer enrol the memorial inaccurately he cannot alter the enrolment without the consent of the Court of

Chancery.(a) The Court of Common Pleas strongly reprobated the conduct of the officer who had corrected an error which he himself had made, and had signed a certificate after the alteration; yet, as was above observed,(b) the Courts will be guided by the record as it appears, without enquiring into the circumstances of the alteration.

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These are the provisions contained in these acts, which refer to the registration of the memorials, it will be proper to introduce other enactments in the same, regarding certain matters which are required to be inserted in *the deeds of grant*. By the first act several were required, and this enactment caused many of the difficulties which were created by it; the latter act only requires one subject to be inserted.

Contents of the deeds as required by these acts.

It was enacted by the 17 Geo. III. c. 17, s. 3, that "in every deed, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of that act, be granted, or attempted to be granted, the consideration really and bonâ fide,(c) (which shall be in money only,) and also the name or names of the person or persons by whom and on whose behalf the said consideration, or any part thereof, shall be advanced, shall be fully and truly set forth and described in words at length; and in case the same shall not be fully and truly set forth and described, every such deed, instrument, or other assurance, shall be null and void to all intents and purposes."

17 Geo. III.
c. 26, s. 3.
Statement of the consideration.

The decisions upon this section were many, and shall be briefly mentioned.

Though the statute said, that in *every* deed, instrument, or other assurance, the consideration should be stated, it was held sufficient, where several deeds made one assurance, to insert the consideration in one only.(d)

Decisions thereon.

The consideration which was required to be stated was the pecuniary sum actually paid; therefore, although it might have been undoubtedly affected by a power of redemption reserved by the grantor, yet this power was not

(a) Garrick v. Williams, 3 Taunt. 541.

(b) p. 103.

(c) The word "paid" seems to have been omitted.

(d) Hodges v. Money, 4 T. R. 500.

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such a portion of the consideration as needed to be inserted in the deed. (a)

So, if the time of payment were long delayed, the consideration might have been diminished, and therefore the time of payment might perhaps, under certain circumstances, have been proper to be inserted, but that was not the case where the delay was very trifling, as in *Coare v. Giblett*, and *Craufurd v. Phillips*, the facts of which cases have been detailed above, in pages 110, 111.

As to the true description of the consideration, it was held, that where money was lent and paid at different times for the maintenance and education of the grantor, it was correctly stated in the deed as a gross sum lent and advanced, and also paid, laid out, and expended for the maintenance, education, and advancement in the world of the grantor. (b)

Difficulty on the words "which shall be in money only."

Some difficulty arose from the words in the parenthesis, "which shall be in money only." One great question which arose will be considered hereafter. (c) But though it was not determined whether the assignment of one annuity was a good consideration for the grant of another, yet it was clearly decided, that where an existing annuity had been purchased by the grantee of the second, as the agent, and at the express instance of the grantor of the second, the money paid for it might be stated in the consideration of the deed as money paid to the grantor, and that it was not necessary that the consideration money should have been actually told out at the time of the grant. (d)

A previous debt, whether created by the advance of money at different times, or by a liability which had become fixed and liquidated before the grant of the annuity, would form a good consideration. The statute only uses the word "money" to prevent goods being supplied to form a part of the consideration. (e) And where the secu-

(a) *Dalmer v. Barnard*, 7 T. R. 250. (b) *Kelfe v. Ambrose*, 7 T. R. 551.

(c) In Chapter V. on the Consideration.

(d) *Ex parte Fallon*, 5 T. R. 283.

(e) *Kelfe v. Ambrose*, *Withy v. Woolley*, 7 T. R. 540.

rity for the debt was retained by the grantee, as this was wrongful, the consideration was held not to become untruly stated, where it was said to be the cancelling of that debt. (a)

Again, the statute requiring the name of the person by whom the consideration was paid, and on whose behalf, was interpreted to signify, where the money was paid by an agent for a principal, that it should be so stated, and that if the money were stated to have been paid by the principal it was wrong. (b) Even where payment was made by the clerk of the grantee's banker, it was held by the House of Lords to be necessary to insert his name in the deeds as the person actually paying. (c) And in the case where money was paid to D. S. one of the grantors, to lodge in the hands of a banker, in his name, until a certain security was perfected, and it was paid out by D. S., two days after, to the grantors, the deed was held void, which stated it to have been paid by the grantee. (d) As at common law, payment by the agent is a good payment by the principal, in this case, on a previous occasion, where it was held that the annuity act was not referred to by the pleadings, the deed had been considered valid. (e)

But where the money was stated to have been paid by the plaintiff to the grantors by the hand of W. his agent, and it also appeared that the grantee had supplied a part only of the money, but was a trustee for another as to the remainder, the deed was held sufficient. (f) It may admit of some doubt whether this would be deemed sufficient under the new act.

A correct statement in the memorial could not aid the deeds if there were any defect therein. (g) At the same time, in a case where the payment was correctly inserted in

(a) *Cheek v. Towers*, 1 Taunt. 372.

(b) *Dalmer v. Barnard*, 7 T. R. 248; *Hoffman v. Cook*. 5 Ves. 623.

(c) *Askew v. Mackreth*, 1 N. R. 214.

(d) *Horwood v. Underhill*, 3 M. & S. 82.

(e) *Coare v. Giblett*, 4 East, 85.

(f) *Cook v. Jones*, 15 East, 237.

(g) *Glasse v. Mount*, 7 T. R. 390.

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53 Geo. III.
c. 141, s. 4.

a receipt indorsed on the deed, though omitted in the body of the deed itself, the Master of the Rolls and the Lord Chancellor, on an appeal, held the annuity valid. (a)

The new act only requires one thing to be inserted in the deed, and that is the name of the party beneficially entitled to the annuity, since by 53 Geo. III. c. 141. s. 4, it is enacted, "That in every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of this act, be granted, or attempted to be granted, for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, where the person or persons to whom such annuity shall be granted, or secured to be paid, shall not be entitled thereto beneficially, the name or names of the person or persons who is or are intended to take the annuity beneficially, shall be described in such or the like manner as is herein-before required in the enrolment, otherwise every such deed, instrument, or other assurance, shall be null and void."

There is no provision here for the insertion of the consideration, but in the stamp acts, 48 Geo. III. c. 149. s. 22, and 55 Geo. III. c. 184. s. 8, it is required that, on the sale of any rent or annuity, where a duty is imposed on the conveyance in proportion to the amount of the consideration, the full purchase money shall be truly set forth in words in the principal deed of conveyance, or in the bond or other instrument whereby it is secured, otherwise the parties shall each forfeit 50% and five times the amount of the excess of duty which would have been payable in respect of the full consideration, if truly expressed. The conveyance, however, is not avoided. It is probable that this requisite in the stamp act was considered as rendering it unnecessary for the legislature to introduce it in the last annuity act.

What are excepted out of the operation of these acts.

But these annuity acts are not of universal application; the enactments, as it will be recollected, refer to annuities granted for life, or for term of years determinable on the

(a) Phillips v. Craufurd, 9 Ves. 214; 13 Ves. 475.

death of a life or lives. Hence an annuity in fee simple or fee tail, or for a definite term of years, is not within them. It has also been already intimated, that they apply only to cases where the consideration is pecuniary. This would have appeared from the general nature of the provisions and the language employed throughout the acts, but the legislature has, in the exercise of its caution, expressly excepted from their operation all annuities or rent charges where the consideration is not pecuniary, and at the same time has excepted several cases where the consideration may be pecuniary.

The concluding clause of each act contains these exceptions, and for the purpose of abbreviation, as they correspond almost entirely, the clause of the latter statute only shall be transcribed, with this understanding, that the passages in italics are not in the former act, and that within brackets is omitted in the latter.

By the 53 Geo. III. c. 141. s. 10, it is enacted, " That this act shall not extend to *Scotland or Ireland, nor to any annuity or rent charge given by will or by marriage settlement, or for the advancement of a child, nor to any annuity or rent charge secured upon freehold, or copyhold, or customary lands in Great Britain or Ireland, or in any of his Majesty's possessions beyond the seas, of equal or greater annual value than the said annuity over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee simple or fee tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at the time of the grant; or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity, nor to any voluntary annuity, or rent charge granted without regard to pecuniary consideration, or money's worth, nor to any annuity or rent charge granted by any body corporate, or under any authority or trust created by act of parliament. [Nor to any annuity where the sum to be paid does not exceed ten pounds annually,*

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17 Geo. III.
c. 26, s. 8.
53 Geo. III.
c. 141, s. 10.

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The decisions
on the former
act,

unless there be more than one such last mentioned annuity from the same grantor or grantors, to or in trust for the same person or persons.]

The alterations in the new act do for the most part but embody and enforce the decisions upon the old one, and will, therefore, be elucidated by the consideration of those cases which have been decided upon the latter.

By the former act, the annuity to be exempted was to be secured on lands whereof the grantor was seised in fee simple or fee tail in possession. It was determined that this exception extended to the case of an equitable seisin in fee, and thus the mortgagor, who had an equity of redemption equivalent with the value of the annuity, came within this exemption. This was first decided by Lord Thurlow in a Court of Equity.^(a) It was then adopted by the Court of King's Bench, in two cases, of *Amburst v. Skinner*,^(b) and *Cumming v. Sir William Twysden*,^(c) and lastly was reviewed and supported by Lord Eldon in *Tucker v. Thurston*.^(d)

In regard to the estate, it was also decided, that if the grantor had power over the fee and a controul over the estate, he came within this exception; and therefore where a father, tenant for life, remainder to his son in tail, reversion to himself in fee, by virtue of a power reserved to him on a recovery previously suffered, together with his son, appointed the lands to a trustee to secure an annuity jointly granted by them, it was held a case within the exception.^(e)

Though each act uses the word "grantor," yet a surety, who charges his own land with the payment of the annuity granted by another, comes within the meaning of this exception.^(f)

It is immaterial whether the security be personal as well as freehold, if the courts be satisfied that the freehold estate is of the value equivalent with the amount of the

(a) *Shrapnel v. Vernon*, 2 B. C. C. 268.

(b) 12 East, 263.

(c) *Ib.* 272. n. (a).

(d) 17 Ves. 131.

(e) *Halsey v. Hales*, 7 T. R. 194.

(f) *Darwin v. Lincoln*, 5 B. & A. 444.

annuity. (a) Where they have doubts, on summary applications they will direct an issue before they interfere. (b)

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The value of the land must equal or exceed the annual amount of the annuity, exclusive of any other annuity or mortgage charged upon the same, of which the grantee has notice, according to the provision of the latter act. It has recently been determined by the Court of King's Bench that this must be a direct and specific charge upon the land, and that the proviso does not apply to the case of an annuity secured by a judgment, which is only an indirect and collateral charge. (c)

Meaning of the
word
"charged."

On the exception of the transfer of stock it was held clearly, that if the dividends were merely charged in the hands of trustees, without an actual transfer, the exemption did not apply. (d)

The clause proceeds to exempt any *voluntary annuity granted without regard to pecuniary consideration*, to which in the latter act was added, *or money's worth*. This has produced various questions, and it cannot be denied that it is not a very clear provision. It must be remembered that these acts were intended to remedy abuses in the purchase and sale of life annuities, where such contract was resorted to for the purpose of raising money, and therefore in all other cases where the purpose is different, and where the parties do not stand in the relation of borrower and lender, it was not intended to interfere. It was the object of this part of the clause, therefore, to confine the application of the acts to this extent. The word "voluntary" seems to have been used somewhat incautiously, because it has had the effect of introducing the doubt whether a conveyance, which is not voluntary in the legal sense of the word, were exempted. The courts have, however, decided in favour of the exemption, and in furtherance of the presumed intention of the legislature, being guided not only by the lan-

Voluntary annuities without regard to pecuniary consideration.

(a) *Ex parte Michell*, 2 East, 137.

(b) *Saunders v. Wright*, 1 Taunt. 369.

(c) *Walford v. Marchant*, 2 B. & Ad. 315.

(d) *Hudson v. Skinner*, 6 T. R. 596. *Duff v. Atkinson*, 8 Ves. 561. *Dupuis v. Edwards*, 18 Ves. 358.

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guage of this section, but also by the nature of the provisions required by the acts.

Thus the relinquishment of a business to the grantor in consideration of an annuity was held within the exception, yet the grant was not voluntary. (a) Even also where it was accompanied with an assignment of household furniture and a loan of money; (b) and in another case, with the *bonâ fide* assignment of book debts and stock in trade, the exemption applied, there not being any intent to evade the provisions of the acts. (c)

In these cases the relinquishment of the business was the main and principal object of the consideration, the rest was only auxilliary thereto, and money was not advanced as the price of the annuity. But in *Crossley v. Arkwright*, (d) an annuity was granted in consideration of the cancelling of a debt owing from the grantor to the grantee, of a small sum of money paid by the latter to the former, and an assignment by the grantor to the grantee of a farm, crops, cattle, and goods, a transaction very complicated. Here the annuity was held to require to be memorialised, but no notice was taken of this exemption, and it was admitted to be within the act.

Again, it has been decided that the money advanced, which is to constitute a pecuniary consideration so as to prevent the application of this exception, must be paid down at the time of the grant, or in express reference to the annuity. Thus in *Keats v. Hick*, (e) where a mother sold her trade and business, and advanced the money arising therefrom to her sons to place them out in business, and it was *afterwards* agreed that her sons should grant her an annuity, which they did, it was held by the Court of Common Pleas, and afterwards by the King's Bench on a writ of error, that this annuity was not within the act, and did not require to be registered; it not

(a) *Crespigny v. Wittenoom*, 4 T. R. 790.

(b) *Hutton v. Lewis*, 5 T. R. 639.

(c) *Doe v. Phillips*, 1 Taunt. 356.

(d) 2 T. R. 603.

(e) 5 Mo. 629. *Hick v. Keats*, 4 B. & C. 69; 6 D. & R. 68.

appearing that the annuity was stipulated for at the time of making the advance, and therefore it must be taken to have been a voluntary grant on the part of the sons.

And where a present annuity was granted in consideration of the sale or assignment of a reversionary interest in stock, the Vice-Chancellor held that it need not be enrolled. "Nothing," he says, "was immediately paid to the grantor. Because the stock might have been sold immediately, it is not therefore to be considered as money." (a)

A question has been argued in the Court of King's Bench very lately, whether, where the grantee transferred stock in the funds to the grantor in consideration of the grant of an annuity, registration were required. It was argued that stock was not money, nor a pecuniary consideration, while it was answered, that with the facility which exists for converting it into money at any time, it must be treated as a pecuniary consideration. The Court desired the grantor to aver on the pleadings, if he were able, that the stock was transferred with a view to an immediate sale by him. This averment could not be made, and the Court, after a second argument, decided that the transfer of stock was not a pecuniary consideration in that case. (b)

The 53 Geo. III. c. 141, has introduced a new term, and the exception is restricted from applying to the cases of annuities granted for "money's worth," which words are ambiguous and certainly convey no very clear notion, especially when compared with the provisions of the act itself. In an ordinary acceptation the words would signify every thing valuable and for which money would be given, and would extend the act to all annuities not voluntary. But this is inconsistent with the whole scope of the statute. In the enacting part of the second section the *pecuniary* consideration is required to be set forth in the memorial, and in the table there is a column for the consideration, and *how paid*, and the examples given are, money, notes, and bills of exchange. In other parts of the act reference is

Or money's
worth.

(a) Browne v. Douthwaite, 1 Madd. 446.

(b) Cumberland v. Kelly, K. B. Mich. T. 1831, East T. 1832.

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made to the *purchase* of annuities, and the broker is to be paid by a per centage on the *amount* of the consideration. The consideration must therefore consist of some precise liquidated sum in order to bring it within the act, or how can it be enrolled, and how can the broker calculate his brokerage? The construction, however, which the courts have put upon these words is, that the act applies to all cases where there is a contract for the sale and purchase of an annuity with the immediate object of raising money for the grantor, and the consideration is either money actually paid, or goods, bills, or merchandize advanced at a specific valuation, which may be immediately converted into money by the party receiving them. These alone are the cases where it is desirable that the transaction should be made known, and the parties should have the benefit of the information conveyed by the provisions of these acts. Therefore all other cases are excepted.

Decisions explanatory of these words.

The first case which came before the courts on this exception was *James v. James*, (a) in the Common Pleas. There one entitled to a life interest in certain veins of coal assigned it to the defendant in consideration of the grant of an annuity. No memorial of the annuity was enrolled. And it was objected that though it was not granted for money, yet the consideration was money's worth, and therefore was exempted from the exception. But the court after deliberation decided that the statute did not apply to a fair and bona fide sale of landed property whether freehold or leasehold, where the consideration in part or in whole may be an annuity paid to the vendor. And in such a case the consideration was not money's worth within the statute.

A similar judgment was given in *Harrison v. Smitheringale* (b) by the same court at the same time.

The next case was *Blake v. Attersoll* (c) in the King's Bench. There by a marriage settlement 10,000*l.* was to be paid by the wife's father to trustees on trust to pay the interest to the husband for his life. The father died

(a) 5 Mo. 479; 2 B. & B. 702.

(b) 5 Mo. 481.

(c) 2 B. & C. 875; 4 D. & R. 549.

without having paid this principal to the trustees, and leaving his affairs in embarrassment. It being uncertain whether his estate would suffice to pay his debts, the husband agreed to accept 5000*l.* and an annuity of 125*l.* payable by his father's executors. It was contended that this required enrolment, as the consideration was money's worth. But the court decided clearly that this was not a case within the statute. That it was not the sale and purchase of an annuity but a mere family arrangement.

Mr. J. Bayley, after referring to the second section, says, "It appears clearly therefore that that section contemplated a consideration paid in money or promissory notes or bills of exchange; and construing that section with the tenth, I am of opinion that the legislature intended an annuity bought on the one hand and sold on the other for a consideration moving from the grantee to the grantor. In this case there was no consideration moving from the grantee to the grantor, but the former gave up his right to a large sum of money to which he was entitled in consideration of the latter securing him the smaller sum."

And Littledale, J.—"The object of the two acts, therefore, being the same, the preamble of the first act may be considered as virtually incorporated in the second, and, therefore, I am clearly of opinion that to bring a case within the 53 Geo. III. c. 141, there must be an actual sale of an annuity for money, bills, or goods. The form of the enrolment given by the second section shows that the consideration must be either money or something which may be converted into money."

Lastly came the case of *Tetley v. Tetley*. (a) There, in consideration of his parents giving up to him the possession of a farm with the stock on it, altogether worth 300*l.*, a son granted an annuity of 10*l.* a year to them. No memorial was enrolled, and the Court of Common Pleas held that none was required. The object of the introduction of the words "money's worth" is stated by C. J. Best to be confined to the practice in cases where the grantor received as

(a) 4 Bing. 214; 12 Mo. 441,

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the consideration of his annuity not money but goods of a nominal value, which he was usually obliged to dispose of at half the amount of the consideration. "That there was," he says, "to some extent a transfer of money's worth is clear, but the question is, what was the object of the transfer? Was it a transfer for the purpose of raising money or of making a family settlement? Clearly for the purpose of a family settlement. If the object of the parties is not to raise money but to make a settlement, the case is not within the act, though there should be to some extent a transfer of money's worth." And afterwards he is reported to have said, "If the object of the annuity is not to buy money or goods wherewith it may be purchased, the case does not fall within the purview of the statute."

Registration of
annuities with a
view to voting
at elections.

Such have been the provisions enacted by the legislature to prevent fraud in the purchase and sale of life annuities, which during the lapse of half a century have been accumulated by the enactments and the decisions thereon into the great body of which this chapter contains but a brief abstract. As to the regulations for remedying abuses they will be examined hereafter. But it is a fit opportunity to notice here provisions of less frequent application than the above, and which have been introduced to check a fraud of a different nature from the subject of the former discussion, though perhaps of greater importance. They apply, moreover, to rent charges only. It will be remembered that a rent charge of 40*s.* annual value, if the grantee's interest therein be of a freehold extent, confers on the grantee a qualification for voting at elections for member of parliament in counties, and in some cities and boroughs. In consequence of this property, and the ease and secrecy with which the grant might be made, frauds were often practised on the elective franchise, electors were made so readily and speedily, that an election might in some cases be carried by persons having only a very slight, nay, almost a nominal, interest in a county. To prevent this, the act of the 3 Geo. III. c. 24, was passed, requiring a registration of annuities or rent charges, the provisions of which shall

be briefly stated, the limited application of the act rendering the insertion of the whole of it unnecessary.

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After reciting the fraudulent practices to which these rent charges are liable, the first section enacts that no person may vote in elections of knights of the shire, or of members in cities and towns which are counties of themselves in England, for or in respect of any annuity or rent charge issuing out of lands or tenements granted before June 1, 1763, unless a certificate, on oath, be entered with the clerk of the peace or other proper officer, twelve calendar months before the day of election.

The certificate, of which a form is set out, is of the seisin of the person claiming before the 1st of June, 1763, in himself or the party through whom he claims.

The second section applies to such qualifications as come to the elector by descent, marriage, devise, presentation to a benefice, or promotion to an office within twelve calendar months *before the day of election*, in which case a similar certificate of such qualification must be entered with the clerk of the peace, or proper officer, *before the first day of the election*.

By the third section it is enacted, that no person shall vote at any election in respect of any annuity or rent charge granted after the 1st of June, 1763, unless a memorial of the grant on parchment, under the hand and seal of the grantor, be registered with the clerk of the peace or other proper officer, twelve calendar months at least *before the day of the election*. The memorial is to be attested by two witnesses, one of whom shall be an attesting witness to the execution of the grant, and it shall contain the day and year of the date, and the names, additions and abodes of the parties and witnesses, and the lands charged and their situation, and the grant is to be produced at the time of registering, and the day and year of entering the memorial is to be indorsed thereon by the proper officer.

Section 4 provides for assignments of annuities. If the annuity has been assigned before the 1st of June, 1763, a certificate of such assignment is to be entered as in the case

CHAP IV, OF THE REGISTRATION. of an original grant. And if the assignment be after the 1st of June, 1763, then a memorial of the assignment and of the original grant is to be registered as is directed in the previous section.

Section 5. The clerks of the peace and other proper officer shall keep books for entering the certificates and memorials, and shall be entitled to certain fees; on application must give out copies, which shall be legal evidence.

Section 6. Memorials of grants or assignments made and executed above forty miles from the office of the clerk of the peace, &c. are to be registered upon the production of an affidavit made by one of the witnesses to the execution before one of the judges at Westminster, or a Master in Chancery ordinary or extraordinary.

The other clauses are not material for the purposes of this Treatise. (a)

(a) This act has not been expressly repealed, but the provisions of the 2 Wil. IV. c. 45, seem to be so inconsistent with it, that the author in his revision of the lists for the Northern Division of Staffordshire, felt himself bound to hold it virtually repealed. On other circuits, however, he is informed a different view was taken, and, accordingly, he has not thought it right to omit it.

CHAPTER V.

OF THE CONSIDERATION.

THESE formal regulations regarding annuities having thus been discussed, that for which in a great measure many of those regulations have been enacted, namely, the consideration, shall now be examined. The motives and object of the grant often become an important subject of inquiry. The grantor may be actuated by good or fraudulent motives; he may contemplate the breach of some law, or his grant may tend to violate some rule of public policy, or general morality; or it may have been induced upon some false and erroneous grounds. All these cases may lead to investigation. Under the general freedom of property all persons who are solvent may grant annuities at their mere will and pleasure, as acts of pure generosity or gratitude, or by way of reparation for injuries inflicted, or of compensation for services rendered, or even for mere caprice. The law lays no restraint upon such conduct. Thus also the impulse of affection may induce a provision for relatives, whether any obligation have been created by marriage or not. In these instances the motives which operate upon the mind of the grantor will be generally good, and often very laudable. Again, the grant may be the result of a contract entered into by the parties, in which, as in others, fraud will sometimes appear, either committed by one of the parties against the other, or by one or by both against third persons.

The motives
which induce
the gift of an
annuity.

All these different motives, as they affect the consideration for the grant, shall now be discussed at length.

The legal division of the consideration into good and valuable will be remembered. The former applies to all

Consideration
good and valu-
able.

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those cases where a party is influenced by good moral obligations, or pure personal affection alone; the latter where some pecuniary or equivalent advantage, or some legal liability pressing on the party affected, induces the grant. Thus the consideration which moves a father to grant an annuity to his son or daughter is usually a good consideration only, while if he settle an annuity on his wife before their marriage, or grant one to a creditor in satisfaction of a debt, it is held to be valuable. This is very well elucidated by the case of *Dr. Young*.^(a)

The Duke of Wharton, by a deed-poll, "considering that the public good is advanced by the encouragement of learning and the polite arts, and being pleased therein with the attempts of *Dr. Young*, in consideration thereof, and of the love he bore him," granted him an annuity of 100*l*. This was held by Lord Hardwick to be not a legal consideration, so as to be *valuable* in the eye of the law, although it might be a very *good* inducement. But this annuity fell into arrear and the duke granted another in consideration of the arrears, and of *Dr. Young's* having refused an annuity of 100*l*. offered him to stay as tutor to Lord Burleigh, for which the duke was desirous of making him amends. This was holden to be a *valuable* consideration, for the giving up of a certain pecuniary advantage is equivalent in this respect with money actually paid down. Lord Hardwick farther decided that the forbearing to sue on the first annuity converted the second from a voluntary grant to one on a valuable consideration.

Fraud.

Whether the consideration be good or valuable, it is binding, as between the parties, unless fraud intervene. But the subject of fraud will require much discussion, and may be well considered under the two heads already pointed out, as affecting, first, one of the parties; secondly, third persons, not parties.

In cases of contract between the parties.

The greatest, at least, the loudest, complaints of fraud between the parties have arisen in cases where the grant

^(a) *Stiles v. A. G.* 2 Atk. 152. See also *Gilham v. Locke*, 9 Ves. 612.

has been the result of a contract. Distress and sudden necessities impelling men to resort to the granting of annuities as a mode of obtaining speedy though temporary relief; those to whom they applied craftily availed themselves of their situation, and practised frauds, which the secrecy of the transaction, and various circumstances too frequently attending thereon, easily protected.

One fraud of no unfrequent occurrence was, where the person who purchased the annuity, that is, who was to advance, a sum of money for it, offered to the grantor, in payment of that consideration, certain goods charged at an enormous price, instead of actual money, and then, in pursuance of the same fraud, repurchased them, or recommended some person who would become the purchaser. The unfortunate grantor, pressed by his necessities, was compelled to submit, and either found that the goods were worthless, or could only obtain the ready money which he required by a great sacrifice.

In order to check this fraud, the stat. of 17 Geo. III. c. 36, prohibited the payment of the consideration in goods, By the 4th section, it was enacted, among other provisions, which will be mentioned hereafter, that "if the consideration, or any part of it, was paid in goods," the Court might order the securities to be cancelled or vacated. And in the 3d section it was also enacted, that the consideration really and bonâ fide paid, ("which," added the statute, "shall be in money only,") should be truly set forth in the deeds. Some doubts arose on this as on the other parts of this act. In *Shove v. Webb*,^(a) it was held that the statute did not apply to a case where the consideration for the grant of an annuity was formed of money in part, and of a debt contracted by the purchase of goods long prior to the agreement for the grant of an annuity. And in subsequent cases it was held that an existing debt, previously contracted by the parties, might form the consideration of the grant.^(b)

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Where goods
are given in pay-
ment of the
consideration.

Prohibited by
17 Geo. III.
c. 76, s. 4.

(a) 1 T. R. 732.

(b) *Exparte Fallon*, 5 T. R. 286. *Kelfe v. Ambrose*, 7 T. R. 551.

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Permitted under
a regulation by
53 Geo. III.
c. 141, s. 6.

By the stat. 53 Geo. III. c. 141, this prohibition is repealed, and the supply of goods as a part of the consideration is again allowed, but it is subjected to restraint, since by section 6 it is enacted, that "if the consideration is expressed to be paid in money, but the same or any part of it shall be paid in goods," the Courts may order the securities to be cancelled or vacated. The statute does not state where this expression refers to. In regard to the memorial, it is observable that the 2d section requires that the *pecuniary consideration* shall be set forth in the memorial, and the column for the consideration is headed "The consideration and how *paid*." The example is, "100*l.* paid in money, 500*l.* paid in bank notes, or other notes, or bills of exchange, as the case may be." So that the case is not explicitly provided for in the memorial; and as to the deeds, there is no provision for their contents, as in the former act, except with reference to the person beneficially interested. At the same time, annuities granted for money's worth must be memorialised.

It is suggested by a writer in the Law Magazine, (a) that the use of the word "paid" in the sixth section explains the same word in the schedule, and that a supply of goods should be stated in the column under the title consideration. He also thinks that the word "pecuniary" in the second section ought not to be confined to a money payment, but should be interpreted in the peculiar distinction between *pecunia* and *nummus*. It is difficult in that view to determine what is excluded from the signification of the word pecuniary. The reader is, however, referred to the cases and authorities already discussed under the exceptions of those acts. This appears certain, that a supply of goods is no longer prohibited, but where they are supplied, the consideration must not be stated to have been money, but such goods.

The return and
retainer of the
consideration, or
part thereof.

Other common expedients of fraud practised by money lenders were the retainer, under various pretexts, of the

(a) N^o. 15, p. 113.

consideration, or the causing portions of it to be returned. The attention of the legislature has been directed to these fraudulent practises, and the following regulations have been made in the statutes concerning annuities.

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By the stat. 17 Geo. III. c. 26, s. 4, and 53 Geo. III. c. 141, s. 6, it is enacted, (a) " That if any part of the consideration *for the purchase of any such annuity or rent charge* shall be returned to the person advancing the same; or in case such consideration or any part of it shall be paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; [or if the consideration, or any part of it, is paid in goods;(b)] *or if such consideration is expressed to be paid in money, but the same or any part of it shall be paid in goods*; or if the consideration or any part of it shall be retained on pretence of answering the future payments of the annuity or rent charge, or any other pretence; in all and every of the aforesaid cases it shall and may be lawful for the person by whom the annuity or rent charge is made payable, *or whose property is liable to be charged or affected thereby*, to apply to the court in which any action shall be brought for payment of the annuity or rent charge, or judgment entered, by motion, to stay proceedings on the action or judgment; and if it shall appear to the Court that such practices as aforesaid or any of them have been used, it shall and may be lawful for the Court to order *every* deed, bond, instrument, or other assurance, *whereby the annuity or rent charge is secured*, to be cancelled, and the judgment, if any has been entered, to be vacated."

17 Geo. III. c.
26, s. 4.
53 Geo. III. c.
141, s. 6.

The difficulty of proving the fraud arising from the obscurity of the transaction, and the incompetency of the injured party to give evidence, formed the great security which protected money-lenders. It is true that the Courts at Common Law possessed a power of controlling all such instruments as take their force and effect from the acts of

(a) Note, the passages in italics are introduced into the new act.

(b) This passage in the former is omitted in the latter act.

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the Courts alone, namely, warrants of attorney and cognovits, and would hear the complaints of the party against whom they operated. But there was no power to affect other securities; they could only be defeated by the ordinary course of proceeding, and by ordinary proof. But by these statutes the power naturally belonging to the Courts in the former cases is extended to all kinds of securities, and a summary application, supported by the evidence of the party aggrieved, may be made to the Courts, and be repelled by similar testimony of the party complained against.

The return of
 the considera-
 tion prohibited.

The statutes prohibit the return of the consideration or any part of it. It was held, therefore, that a solicitor, who advances his own money, cannot charge any commission fee; and where a part of the consideration was returned as a payment of such a charge, the Court set aside the annuity. (a) It should seem also, from the same case, that unreasonable charges would fall under the same prohibition. But the inadvertent insertion of an improper item where no fraud was intended, will not be treated as a violation of the act. (b)

Payment of ex-
 penses not a re-
 turn of the con-
 sideration.

Some doubts have been expressed as to the grantor's paying the expenses of the deeds out of the consideration money. It has been thought that here a portion of the consideration is returned. Already this has been observed upon above, in page 109. And in the case of *Mouys v. Leake*, (c) there referred to, it was held by the Court of King's Bench that where the parties had agreed that the grantee should pay the expenses of the writings, the payment to the attorney of his bill out of the consideration money, was not a return of a part thereof within the prohibition of this statute. It is clear that as the grantor was to pay the expenses, the consideration either was or might have been proportionally increased. And subsequently, where there was no previous agreement, it was held by the Master of

(a) *Broomhead v. Eyre*, 5 T. R. 597; *Hunt's A. C.* 298.

(b) *Hurd v. Girdlestone*, 1 Marsh. 407; 6 Taunt. 8.

(c) 8 T. R. 411.

the Rolls, and by the Lord Chancellor, on an appeal, that a payment to the attorney out of the consideration money was not a return. (a)

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In a late case in the Exchequer the grantee and his partner were solicitors for the grantor, and on the execution of the grant the consideration money was paid over to a trustee, with the grantor's assent, to pay the charges and costs of the annuity and the other debts of the grantor. But Alexander, C. B. held that there was no ground for calling this either a retainer or a return of part of the consideration money. (b)

But although the payment by the grantor of the attorney's charges out of the consideration be not a return thereof, yet this proceeds upon the presumption that the charges are fair and reasonable, and have been actually incurred in negotiating the annuity. Since in several cases that came before the Court of Common Pleas a few years since, annuities were set aside on the ground of a return or retainer of the consideration, where very improper conduct was proved on the part of the agents employed for the benefit of each party. Thus in *Williamson v. Goold*, (c) after payment of the consideration money, the agent made an unreasonable demand for commission, the expenses of the deeds, and unnecessary journeys, which was paid him out of the money advanced, and the annuity was set aside. So also in the subsequent cases of *Gorton v. Champneys*, (d) *Calton v. Porter*, (e) *Henry v. Taylor*, (f) where the agent caused certain sums to be returned for debts alleged to be due to him, and for unreasonable expenses and commission, the same Court exercised a like power. And the Court of King's Bench proceeded in a similar manner in a case where, in pursuance of a previous agreement between the mutual agent and the grantor, the latter, after the payment

Where the charges are unreasonable the grant may be vacated, though the grantee be not cognizant thereof.

(a) *Phillips v. Craufurd* 9 Ves. 214; 13 Ves. 475.

(b) *Aston v. Gwinell*, 3 Y. & J. 136.

(c) 1 Bing. 234; 8 Mo. 109.

(d) 1 Bing. 287; 8 Mo. 302.

(e) 2 Bing. 370; 9 Mo. 703.

(f) 3 Bing. 177; 10 Mo. 588.

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of the consideration, returned a part thereof for an exorbitant commission and an extravagant bill of charges. (a)

In all these cases the actual grantee was not privy to, nor cognizant of, the agent's conduct, yet the courts have held that he must be civilly responsible for it; that if he had properly attended to the transaction, the frauds complained of could not have been effected.

Where three annuities were granted by the same person at the same time and place, and the agent for the grantor and the three grantees retained a note, which was part of the consideration paid by one of the grantees only, for the expenses of all the three, the Court held the whole to be substantially one transaction, and set the three annuities aside. (b)

If the consideration be paid in notes they must be paid when due.

The statutes further provide for the case where the consideration being paid in notes, those notes are not paid when they become due, and in such case power is given to the courts to cancel the securities. Without this power so given by these acts, the only remedy which the grantor would have had would have been against the parties liable on those instruments, while his own grant would have been in force against him. The acts use only the word notes which shall not be paid when due, or shall be cancelled; notes have a particular meaning, and do not generally comprehend bills of exchange, but there can be no doubt that the statutes are intended to apply to one as to the other, and in the case of *Cook v. Tower*, (c) where an objection was raised on this part of the clause, it was not pretended that bills of exchange were not comprehended in it.

In that case the grantee, in payment of the consideration, drew a bill on one Bousfield, who accepted it for his accommodation; he omitted to find funds for it, and it was dishonoured, but on notice the drawer paid it four days after it became due. The Court of Common Pleas held themselves not bound to vacate the annuity, and therefore,

(a) *Finley v. Gardner*, 6 B. & C. 165; 9 D. & R. 207.

(b) *Jones v. Silberschildt*, 4 Bing. 26; 12 Mo. 113.

(c) 1 Taunt. 372.

there being no fraud intended nor practised, refused to disturb it. Mansfield, C. J. says in his judgment, "The intention of the act was to prevent grantors from receiving paper worth nothing; here the party receives the money as soon as he could demand it of the drawer. Privity and consent must in such a case as this mean some contrivance that the bill should not be paid."

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The regulations regarding the payment of the consideration by a supply of goods, have been already examined. (a)

The statutes also prohibit the retainer by the grantee of any part of the consideration on any pretence whatever. This was a fraud frequently practised, and which is very similar to what also occurred in the cases of the return of the consideration. The observations which have been already made above on the latter fraud apply for the most part to the present. It is not always easy to determine whether the fraud has been committed in the one form or the other, and as each is prohibited, it is not of much importance to distinguish them, except in so far as the fraud is more easily detected when it is presented in its proper form. It has been seen that the retainer must be really fraudulent, and with the intent to benefit the grantee at the expense of the grantor. In elucidation of which may also be cited *Coare v. Giblett*. (b) There several parties were to execute the deed of grant, and all but one did so, on the 24th of December; the consideration was then paid by the grantee and deposited at a banker's till the 26th, when the other party executed, and it was forthwith paid over to the grantors. It was contended that the consideration was retained, since the grantors had no controul over it during those two days. But the Court of King's Bench denied this. "The word *retained*," said Lord Ellenborough, "in the statute must certainly be understood of a retainer to the party's own use, which was not the case here." So also in *Exparte Mackenzie*, (c) where, as a security, the grantor agreed to make a will, and an affidavit never to revoke it, and the grantee, or her attorney, was to

The retainer
prohibited.

(a) p. 151.

(b) 4 East, 89.

(c) 4 Taunt. 323.

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retain 10% out of the consideration-money till the affidavit was made. The magistrate to whom they applied refused to allow the affidavit to be sworn, and the 10% was paid to the grantor. The Court of Common Pleas held this not to be a retainer within the act. Mansfield, C. J. says, "It means a retaining for the benefit of the person retaining, and to the injury of the person selling the annuity."

The wrong and injury sustained by the grantor must be a real legal injury, as appears from the same case of *Cook v. Tower*. (a) There the annuity was granted in satisfaction of a bond held by the grantee, as a security for a previous debt. But after the annuity deed had been executed, the grantee refused to give up the bond. The court held, that as the bond was extinguished by the grant of the annuity, it became of no value, and its retainer was of no importance.

The act also prohibits, and the court will not sanction, the retainer of any portion to meet the future payments of the annuity. (b)

The grantee is not answerable for the conduct of the grantor's agent.

It has been shown that a retainer by the grantee's agent, or even by the mutual agent, for his advantage, or by his fraud alone, will vitiate the annuity, though the grantee be wholly innocent. But he is not liable for the conduct of the grantor's agent. And, therefore, where the grantor's attorney deducted a large sum for the expenses out of the consideration money, and only paid over the residue; as the grantee was not connected with him, the court refused to disturb the annuity. (c)

The courts have a discretionary power under these sections.

The Courts, however, exercise a due discretion in their examination of the cases where complaints are made upon this section, and will not interfere where, on a fair and reasonable consideration of the case, no actual wrong has been done. Mr. J. Park, in a forcible and elaborate judgment upon the case of *Gorton v. Champneys*, (d) after referring to the practices above-mentioned, observes, "In stating this it will be seen that we do not run counter to

(a) 1 Taunt. 372.

(b) *Mence v. Hammond*, 6 Mo. 491.

(c) *Mootham v. How*, 7 Taunt. 596.

(d) 1 Bing. 294.

the Court of King's Bench, or to former judges of this court, when they held that this clause of the statutes under consideration is not imperative upon the Court to set aside annuities; that they will only do so wherever there is any thing of fraud, pretence, or practice, to keep back from the view of the Court the real truth of the transaction, but will not interfere where the case is clearly and satisfactorily explained, as it was in *Cook v. Tower* in this court, and in the King's Bench in *Barber v. Gamson*, and in *Girdlestone v. Allan*."

The case of *Cook v. Tower* has been already mentioned, but the facts of *Barber v. Gamson* were these: (a) The grantor was desirous of borrowing £5000. by way of annuity to be charged on certain leasehold premises, which at the time were of about the value of £2000. When he applied for the loan he stated it to be his intention to employ part of the sum advanced in building houses on the leasehold premises, which, when completed, would make them fully worth £5000., and before the money was advanced, he offered that part of the consideration should be deposited in the plaintiff's attorney's hands, to be called for from time to time as the improvements were made. This was assented to, and £700. was accordingly so deposited, in the presence of his own attorney. The whole of the money was advanced from time to time as required, except a sum which the attorney kept as due for the expenses of the deed. It was sworn that no profit had been made, either directly or indirectly, by the attorney or the grantee during the time that it was deposited, which appeared to have been not quite three months.

The Court decided, that the power given by the act being discretionary, they could find nothing fraudulent or improper in this transaction, which required them to set it aside; and they discharged the rule, on the terms that no annuity interest should be charged on the £700. while it was deposited. As the grantee had not acted improperly, it would seem that he ought not to have been deprived of

(a) 4 B. & A. 281.

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that interest, but the money having been expended on the premises which constituted his security, he was to that extent benefited by the employment of the money.

In a subsequent case of *Girdlestone v. Allan*, (a) this point was expressly considered, whether the act imperatively required the annuity to be vacated, or left it to the discretion of the Court, and it was decided that the powers given were discretionary. Abbott, C. J. said, "With the decision of *Barber v. Gamson* I entirely concur, and I think it would be most mischievous if we were to construe the act as imperative upon us to vacate securities of this nature on motion."

The remedies granted in this section and the mode of pursuing them, shall now be postponed, and be considered in the Chapter which treats of the Remedies in general.

Of fraud where the consideration is inadequate.

It will be seen that these statutory provisions only extend to enforce the actual agreement between the parties, and to secure to the grantor that consideration which it has been covenanted he shall receive. But there are numerous cases where fraud has been practised to deceive and impose on persons to induce a grant on inadequate or improper considerations. It is impossible to point out or describe the different shapes which fraud assumes. The wary and artful will impose on the weak, the imbecile, and the ignorant, or the rich on the needy and the distressed. While in its worst form it insinuates itself under the guise of private confidence, and abuses the most sacred offices of friendship and professional duty. This latter class of frauds has been already adverted to, and will be again examined at length in a following page.

Inadequacy of price is not alone a ground for vacating the grant of an annuity.

Where money forms the consideration, the complaint of fraud usually is raised on the ground of inadequacy. Too little money is given for the annual payment, or the annual payment is too small for the amount of the consideration advanced. Now it is difficult to find a subject so uncertain in its value as an annuity. It depends on the contingency of a life and the solvency of the grantor. No doubt the

(a) 1 B. & C. 61; 2 D. & R. 150.

general observations which men of science and accurate information have made and reduced into regular tables, must be of great use and importance in forming general rules, which may be applicable by those who act in the mass. The error of particular instances on one side of the scale may be corrected by a corresponding error on the other, till the whole errors may be balanced. But in particular instances to act on such rules would frequently lead to an error, where there will be no opposite correction. Those tables are formed on the hypothesis that all lives are equally healthy or exposed to the same accidents, whereas in individual cases there will be found a great diversity, both as regards the bodily health of the annuitant and the risks or perils to which he may be exposed. This is necessarily attended to by the grantee, and always must regulate the value at which he estimates the annuity.

The circumstances of the securities on which the party must rely, also introduce great variety in the value, not reducible to any general rule. A rent charge is more valuable than a personal annuity of equal amount; so where an assignable fund is charged, than where there is only the personal security. Again, events which were only contingent at the time of the grant, may become absolute, and the value of the contract may be proportionally affected. From these and probably many other causes, annuities are so fluctuating in their value, that there can be no definite estimate to guide any court in its judgment on each particular case. Hence it may be stated as a general position, that the mere inadequacy of price alone is no ground upon which the courts will interfere to set aside a contract, whether executory or executed. In *Floyer v. Sherard*, (a) there was an agreement for the purchase of two annuities for the seller's life at six years' purchase, chargeable upon dividends of bank stock, of which the defendant was tenant for life in possession. Lord Hardwick enforced the agreement. In his judgment, he says, "here is no evidence of any particular imposition by the plaintiff, nor does it appear to be a

(a) Amb. 18.

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bargain sought by the plaintiff, but proposed by the defendant's agent. The question therefore is, whether the court can infer any imposition from the price. It is the most uncertain thing in the world, and though there are some calculations in general concerning the value of annuities, yet they depend upon circumstances, and there is always a great difference made as to price between granting an annuity for the buyer's life and the seller's. By the proofs in the cause it appears, that annuities for the seller's life are sometimes sold for seven years purchase and sometimes for six. Take it in the most unfavourable light for the plaintiff, it is sold but one year under the common value, and this court will not take upon them to set aside those grants because sold one year too cheap, where it is the agreement of the parties."

Again, in the case of *Willis v. Jernegan*, (a) Lord Hardwicke says, "It is not sufficient to set aside an agreement in this court to suggest weakness and indiscretion in one of the parties who has engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can show fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement."

A similar opinion has been expressed by succeeding Chancellors, as in *Gwynne v. Heaton*, (b) Lord Thurlow observes, "To set aside a conveyance there must be an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. The principle then is loose enough, looser than I wish it to be established."

And Lord Eldon, in *Low v. Barchard*, (c) said, "It is most clearly settled that legal transactions cannot be set aside upon mere inadequacy of price. It must be applied in this way, that it is evidence of fraud." He therefore refused to set aside an annuity granted for five years' pur-

(a) 2 Atk. 251.

(b) 1 B. C. C. 9.

(c) 8 Ves. 137.

chase on a life of sixty-one, there being no other evidence of fraud. As also did Lord Redesdale in a case (a) where an annuity of 75*l.* on a healthy life of thirty-six was sold for 350*l.*, the deed of grant containing a clause of redemption on repayment of the principal and arrears. In *Speed v. Phillips*, (b) where a man applied for a loan of money, which he obtained in consideration of the grant of an annuity, and of his joining in a mutual guarantee with two other grantors of annuities, the Court of Exchequer, not discovering any fraud but merely a case of inadequacy of price, refused to relieve the grantor. And they had previously dismissed a bill for the redemption of an annuity, where it was proved that the price given was very nearly the market price, protesting against its being understood that it was their opinion that inadequacy alone would be a ground for setting aside the grant. (c) So also where there were some circumstances of suspicion, and the price was charged to have been inadequate, but the evidence upon this head was not clear, the court refused to set aside a contract for the sale of some premises for a rent charge secured thereon. (d)

As an executed contract will not be dissolved on account of inadequacy, so also where an executory contract is objected to on the same ground, it will nevertheless be enforced. Of this there is an example above, in *Floyer v. Sherard*. And it matters not that the inadequacy has been caused by the happening of an event, the contingency of which had affected the consideration. This appears from the cases of *Mortimer v. Capper*, and *Jackson v. Jever*.

In *Mortimer v. Capper*, (e) an estate was sold for a certain sum, together with an annuity during the vendor's life. The annuitant died two days after the contract was reduced into writing. The vendee filed a bill for a specific performance against the heirs. They insisted, that as no

(a) *McGhee v. Morgan*, 2 Sch. & L. 395.

(b) 3 Anst. 732.

(c) *Barnard v. Flint*, 1b. 733, n.(d) *Griffith v. Spratley*, 1 Cox, C. 383.

(e) 1 B. C. C. 155.

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payment of the annuity had been made, the contract failed, and they relied on *Pope v. Roots*.

The Lord Chancellor. "The inquiry should be as to the value of the annuity for the life of the vendor, in order to introduce the question, whether an estate, being disposed of for an annuity, which is a contingency, the contract shall fall to the ground if no payment of the annuity be made. I think, if the price be fair, the contract ought not to be cut down merely because the annuity, which is a contingent payment, never became payable."

The plaintiff's counsel cited a case (*a*) before Lord Bathurst, where the annuitant died before any payment of the annuity became due, and as the contract appeared to be fair, that Chancellor refused to set it aside.

Soon after the case of *Mortimer v. Capper* was decided, *Jackson v. Lever* (*b*) occurred, the facts of which have already been stated above, page 72, and the decision fully supported the present principle.

Both these cases have been since recognized and approved of by Lord Eldon, in *Coles v. Trecothick*, (*c*) and by Sir J. Leach, in *Kenny v. Wexham*. (*d*)

The case of *Pope v. Roots*, (*e*) which will also be found above in page 72, does not impugn this doctrine: there the party seeking to enforce the contract, had neglected to exhibit a proper diligence while the event was contingent, and therefore the Court of Equity did not think it right to interfere.

The event of the transaction certainly here proves the contract to be very disadvantageous to one party, and the consideration for the grant is very greatly affected; but at the time of the contract, which alone can be referred to, that event being contingent, the parties make a mutual allowance for the possibility of its happening, and have no right to complain if the calculation proves erroneous.

(a) *Baldwin v. Bowler*.

(b) 3 B. C. C. 605.

(c) 9 Ves. 246.

(d) 6 Madd. 355.

(e) 1 B. P. C. 370. ed. To.

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When, however, there was a very gross inadequacy in the original contract, and the grantee required the assistance of a court of equity, that court refused to interfere in his behalf: here an annuity, being worth nine years' purchase, was sold for only five. (a)

But though inadequacy of price be not alone a ground for cancelling a contract, yet it may, as was stated by Lord Eldon, (b) be used as an evidence of fraud,—that is, where there are other circumstances of suspicion, the inadequacy of price will add weight to the charge of fraud. Thus where an attorney contracts with his client, a suspicion is raised, and if the price be inadequate, the contract will be set aside.

Inadequacy of price may be evidence of fraud.

In *Heathcote v. Paignon*, (c) Lord Thurlow says, "There is a difference between inadequacy of price, and evidence arising from inadequacy. If there is such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will show a command over him amounting to fraud. If the transaction be such as marks overreaching on one side, and imbecility on the other, it puts the parties into such a situation as to show it could not have taken place without superior powers on one side over the other."

In this case, an annuity had been granted by a man of thirty, occasionally afflicted with the gout, for four years' purchase. The Master of the Rolls had set it aside, and on appeal, the Lord Chancellor confirmed his decree. "Where there has been a loan," further observed Lord Thurlow, "and the terms have been such as to show the distress of the party, the Court has given relief. Here there was twenty-three per cent. profit, with a certainty of the principal being secure."

The propriety of Lord Thurlow's application of the rules

(a) *Vaughan v. Thomas*, 1 B. C. C. 556.

(b) In *Low v. Barchard*, cited above. See also *Stilwell v. Wilkins*, Jac. 282. *Darley v. Singleton*, Wightw. 25; *Evans v. Llewellyn*, 1 Cox, C. 333. *Drought v. Eustace*, Roll. Ch. C. in Ireland, 335.

(c) 2 B. C. C. 170.

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he lays down to the particular case has been doubted, indeed, but not the rules themselves. See *M'Ghee v. Morgan*, 2 Sc. & L. 395.

This same principle had been acted upon in the early case of *Ardglas v. Muschamp*. (a) There Lord Ardglas, a dissipated young nobleman, who had ruined his constitution by his excesses, was induced by Muschamp, the defendant, to grant him a rent charge of 300*l.* in fee, to commence on his dying without issue male, in consideration of 300*l.* A bill was filed by his uncle, who succeeded in remainder, to set aside the rent charge, as being founded on fraud and imposition. At first the Lord Keeper doubted, but afterwards decreed a reconveyance or release of the grant, on payment of the sum advanced with interest: and on a rehearing he confirmed this decree, but it seems refused to allow the interest.

The same defendant had obtained another similar rent charge for one Pitt, and the Lord Chancellor, believing Pitt to have been acquainted with the circumstances and condition of the grantor, set it aside on payment of the principal and interest. (b)

In another early case, (c) a conveyance of an estate worth 40*l.* a year, in consideration of the grant of an annuity of 20*l.* was vacated. Here the grantee was an old man seventy-two years of age, when he executed the conveyance, and had no security for his annuity but the deed of covenant, which was not in his own hands. The Court held it to be a case of apparent fraud, for though one of the grantors was a kinsman, the other was a stranger. Again, in *Taylor v. Obee*, (d) the price was very inadequate, and there were other circumstances, as the breach of confidence, superior intelligence on the one side and age and infirmity on the other. Under all these circumstances, the Court of Exchequer set aside a contract for the sale of a house in consideration of a very inadequate annuity.

(a) 1 Vern. 237; 2 Rep. Ch. 266.

(b) *Ardglas v. Pitt*, ib. 239.

(c) *Clarkson v. Hanway*, 2 P. W. 208.

(d) 3 Pri. 83. See *Oliver v. Court*, 8 Pri. 187.

But where inadequacy of price is set up as a proof of fraud in the formation of any contract, it is for the party seeking to impeach it, to prove the inadequacy distinctly. (a)

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There are two classes of cases where fraud has by experience been found too often to be practised, and they are where persons part with their reversionary interests, and where persons contract with those whose interests have been in any way entrusted to them. When distress and urgent necessity press upon an expectant heir, or one entitled to any property in reversion, if he endeavour to relieve himself by the sale of his future property, he is exposed to fraud and imposition, and would often be compelled to part with it at a ruinous sacrifice. A court of equity, however, offers him its protection, and saves him from the effects of his imprudence, inexperience, or distress. Accordingly, an unconscionable bargain made in such cases will be set aside. Here the principal fact in proof will oftentimes be merely an inadequacy of price; but the situation of the party is considered as affording strong additional evidence of imposition and fraud.

Of sales by expectant heirs, or reversioners, of their future interests.

Lord Thurlow, in *Gwynne v. Heaton*, formally expresses the principle of this rule when he says, (b) "It has also been said that the owners of reversionary interests are as competent to dispose of them as the owners of other estates. In the modern cases this is allowed, with the qualification that there is a policy in justice protecting the person who has the expectancy, and reducing him to the situation of an infant, against the effects of his own conduct." The Court avows the disability, but not the length to which it disables; and afterwards, "The heir of a family, dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed."

In the case before his lordship, a young man in dis-

(a) *Griffith v. Spratly*, 1 Cox, C. 390.

(b) 1 B. C. C. 9.

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tressed circumstances granted a reversionary interest, to which he was entitled after the death of his father, at that time eighty years of age, and infirm, to a person who was acquainted with his family condition, in consideration of an annuity on the life of his father, at seven years' purchase. The Lord Chancellor set it aside.

Nott v. Hill (a) was, perhaps, the first case on this part of the subject. There an heir, entitled in the event of surviving his father, parted with his reversion for a very inadequate annuity. Lord Nottingham at first set aside the grant. Lord Keeper Guilford reversed this decree, not recognizing the principle which restrains heirs from selling their reversions. On a rehearing, however, the Lord Chancellor Jefferys restored the original decree of Lord Nottingham. And this case was followed by many others. (b)

The rule has been expressed generally as applicable to all persons entitled to expectancies; the mere youth of the parties is not the subject of inquiry. For Lord Eldon observed, in *Davis v. Duke of Marlborough*, (c) "years do not make much difference in the protection afforded to an expectant heir."

It must not be imagined that any device, such as the transferring some slight present interest, or even incurring a present liability, will prevent the interference of the courts, where the contract is substantially a bargain for a reversionary interest. It will be scrutinized as such. (d)

It is not, however, intended to prevent the sale of reversionary interests altogether, but it is only when the contract is unconscionable that it is set aside. If a fair and adequate price be in fact given, the transaction will not be disturbed. Therefore when a reversion is sold by public auction, which is an open and fair sale, the contract will be

(a) 1 Vern. 167; 2 Vern. 27.

(b) See, among others, *Berby v. Pitt*, 2 Vern. 14; *Barney v. Beak*, 2 C. C. 136; *Twisleton v. Griffith*, 1 P. W. 310; *Barnardiston v. Lingood*, 2 Atk. 133; *Bowes v. Heap*, 3 Ves. & B. 117.

(c) 2 Swa. 143.

(d) *Ib.* 155.

supported. Here there is no treaty between the vendor and the vendee, no opportunity for fraud or imposition on the part of the purchaser, and the auction is considered a fair criterion of the market price. (a) At the same time, if the circumstances of the sale itself be such as necessarily to disclose great distress on the part of the vendor, and the price appear to be inadequate, it has been held in one case that relief should be granted. (b)

There is also a case decided by the House of Lords, where a reversionary expectancy to an annuity of 60*l.*, and a contingent interest in an estate, were sold for 50*l.* and an immediate annuity of 100*l.* Here the agreement seemed to be fair and adequate, and was enforced against the seller without prejudice to his issue. (c)

As the price may not be inadequate, and the contract may be supported, the courts of equity show their protection of the vendor by casting the burthen of proof of adequacy upon the purchaser. He who deals with another for an expectancy is required to prove the adequacy of the price; it is not enough to show the absence of any specific fraud or imposition. (d) And this adequacy must be estimated at the time of the contract, subsequent events cannot be allowed to affect it. (e) But in the estimation of the price the courts will not rely upon the arithmetical calculations of an actuary, if such calculations exceed what could be obtained by a fair sale, and if the money actually advanced be paid under circumstances of perfect fairness and equity at the time. (f)

Neither will the value be estimated after the contingency on which the reversion depended has happened, unless there has been fraud and imposition, because the whole

(a) *Shelly v. Nash*, 3 Madd. 232. (b) *Fox v. Wright*, 6 Madd. 111.

(c) *Green v. Green*, 1 B. P. C. 143, ed. To.

(d) *Peacock v. Evans*, 16 Ves. 512; *Gowland v. De Faria*, 17 Ves. 20; *Ryle v. Swindells*, M'Clel. 519; *Ryle v. Brown*, 13 Pri. 758, S. C.; *Davis v. Duke of Marlborough*, 2 Swa. 122, 139; *Marsack v. Reeves*, 6 Madd. 108; *Hinckman v. Smith*, 3 Russ. 433.

(e) *Gowland v. De Faria*, 17 Ves. 20.

(f) *Headen v. Rosher*, M'Clel. & Y. 89.

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subject is usually one of chance, which may turn out profitable to the purchaser, or the reverse. (a)

These principles only apply in cases where the contract constitutes a sale. If the transaction entirely, or in part, amounts to an act of bounty, the question of adequacy does not arise, since the esteem of the grantor compensates any inadequacy of price. "Love and affection also," observed the Master of the Rolls, "would have supported the conveyance without any pecuniary consideration, and will equally support it when there is a pecuniary consideration wholly inadequate to the value of the estate." This occurred in *Whalley v. Whalley*. (b) There an uncle, in a state of infirmity, and eighty years of age, entitled to a reversionary interest, worth 6000*l.*, conveyed the same to his nephew for an annuity on his own life of 100*l.* and 30*l.* on his sister. In the recital of the deed this consideration alone was mentioned, but in the witnessing part of the deed the farther consideration of love and affection which he bore to his nephew was expressed. A bill having been filed forty years, after the execution of the deed, to set aside this conveyance, on the ground of fraud, apparent from the gross inadequacy of the price, the Master of the Rolls held, that as there was no sufficient evidence to prove this to be a sale it must be taken to be an act of bounty, induced by the consideration of affection expressed in the deed, and he dismissed the bill without costs, there being nothing to prove a fraud. On appeal to the House of Lords this decree was affirmed.

Of contracts between fiduciary relations.

The other class of frauds of frequent occurrence is where confidence is abused and trusts broken. The reliance which is necessarily placed in persons who stand in particular relations, creates a confidence which facilitates the commission of fraud, where there is a wicked disposition ready to avail itself of the temptation. To prevent the breach of trust, and abuse of confidence, it has been attempted, as seen above, to restrain all contracts between

(a) *Nicols v. Gould*, 2 Ves. S. 423.

(b) 1 Mer. 436; 3 Bl. P. C. 1.

parties standing in confidential and fiduciary relations with each other. But where such restraint has proved vain, and parties have nevertheless contracted, a Court of Equity will strictly scrutinize the whole transaction; and though it may be too much to say that the contract will be necessarily rescinded, yet the party in whom confidence has been reposed will be required to prove satisfactorily its fairness and adequacy.

To avoid unnecessary repetition the reader is referred to page 61, above, for the rules applicable to the ordinary relations, and the cases upon this point. But besides those relations which necessarily create a confidence, and are generally recognized in the affairs of men, there is also a confidence sometimes raised by artifice and subserviency, which exerts an undue influence over the minds of weak and indolent persons. If advantage be taken of this influence, and fraud appear, protection or relief will become necessary, and will be accordingly afforded. Where the mind has become wholly deranged, or where partial delusion or senile imbecility has destroyed its powers, no one shall be allowed to practise on the unfortunate object, and obtain a transfer of property which its owner can no longer estimate. The cases of decided insanity are rare, because few have had the hardihood either to attempt or to justify practices on the mind of the lunatic; but where temporary delusion operates naturally, or by the exertion of an undue influence, persons have been frequently found who have attempted to derive a fraudulent advantage to themselves from such imbecility. If, however, the imposition can be proved, it will be defeated, either at the suit of the party imposed upon, or of those ultimately injured by its effect. Besides a reference to the cases cited in the margin, (a) where these general principles have been pronounced and acted upon, it may be right to cite *Norton v. Rely*; (b)

(a) *Bennet v. Vade*, 2 Atk. 324; *Taylor v. Obee*, 3 Pri. 83; *Lord Donegal's Case*, 2 Ves. S. 407; and especially the case of *Blackford v. Christian*, 1 Knapp's Pr. Coun. Cases, 78; *Maccabe v. Hussey*, 2 D. & Cl. P. C. 440.

(b) 2 Eden, C. 286.

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there a dissenting minister, by his spiritual calling, obtained an undue influence over the mind of a lady, one of his congregation, by means of which she was induced to grant him an annuity. The Lord Chancellor Northington set it aside as founded on fraud, and made the grantee pay the costs.

So also in *Huguenin v. Baseley* (a) a confidence reposed in a clergyman was abused, and a grant, improper and unjust, was obtained from a woman acted on by an undue influence. She herself applied to have it cancelled, which Lord Eldon ordered to be done.

There is a case which perhaps falls under this class, though its circumstances scarcely warrant its being treated as a fraud—it is *Priestly v. Wilkinson*. (b) An apothecary agreed with his patient, who was in a desponding state of mind, to give him 30 guineas to receive 500, or an annuity of 100*l.*, if he should survive a year. He did so, but dying without paying either, the grantee filed a bill against the executors for the annuity, or the 500 guineas.

By the Lord Chancellor.—“It is impossible for me to entertain such a bill as this. He could do nothing upon it at law. If he goes to law he will lose the whole. But I think the money actually advanced ought to be paid back; it is hard and inequitable to refuse that, for if the bill had been to set this agreement aside, the money actually advanced must have been repaid. But that is the utmost I can do; for this is not a bargain a man should gain by. Let the bill be dismissed without costs.”

Where relief is
refused after
confirmation.

If fraud can be proved, a court of law will give relief to the party complaining equally as a court of equity, but the proof is more difficult in the former than in the latter. Nor will the same strictness be pursued in examining transactions between confidential parties, or bargains for reversionary interests. There are also some difficulties in the way of an insane person attempting at law to cancel his deeds. Hence relief in cases of fraud is more frequently sought for in a court of equity. How that relief is given,

(a) 14 Ves. 273.

(b) 1 Ves. 214.

and upon what terms, will be discussed hereafter. It will be necessary to consider here when relief is refused; and that is when the transaction, although fraudulent, has been confirmed by the party injured. Confirmation or ratification may be twofold; 1st, Either by some express act; or 2d, By tacit acquiescence during a long period of time.

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In regard to an express confirmation, if a party of mature age and perfectly unrestrained, having a full knowledge of the circumstances of the fraud, or at least that the transaction was impeachable, and that he has power to vacate it, think fit to confirm and ratify a previous fraudulent transaction, a court of equity will not interfere to relieve him from the original fraud, nor to stay the proceedings on the instruments of confirmation. (a)

Of express confirmation.

So if the matter in dispute be doubtful, and the confirmation be made by way of compromise, though it turn out that the price given for the compromise is inadequate, still it will be enforced, provided the doubts have not been created through the fraudulent suppression of facts by one of the parties. (b)

Where any of these requisites fail, the confirmation will not be recognised, but the attempt to obtain it will render the original fraud more manifest.

Again, the confirmation may arise from the tacit acquiescence of the party injured during a long period of time, or by acts done in conformity with the transaction impeached. (c) As the payment of the annuity for many years would probably be considered as an acquiescence amounting to a confirmation, though in *Heathcote v. Paig-non*, (d) where it was urged for the grantee that the grantor had ratified the contract by paying the annuity for

Of tacit confirmation.

(a) *Crowe v. Ballard*, 1 Ves. J. 220; 3 B. C. C. 117. *Roche v. O'Brien*, 1 Ba. & Be. 353. *Murray v. Palmer*, 2 Sch. & L. 486. *Cole v. Gibbons*, 3 P. Wms. 294.

(b) *Roche v. O'Brien*. *Leonard v. Leonard*, 2 Ba. & Be. 180. *Naylor v. Winch*, 1 S. & S. 555.

(c) *Low v. Barchard*, 8 Ves. 135. *Gregory v. Gregory*, Coop. 201. *Hicks v. Cooke*, 4 Dow, P. C. 16. *Champion v. Rigby*, 1 Russ. & M. 539.

(d) 2 B. C. C. 175.

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three years, the Lord Chancellor set it aside, and took no notice of this.

But it is required that the party should have been acquainted with the fraud committed upon him, and have had the means of applying earlier for relief. An acquiescence during the continuance of the distress which induced the first contract, (*a*) or in cases where the transaction is so obscure that the complainant could not learn its true nature earlier, (*b*) or where the conduct of the party who has committed the first fraud has rendered it difficult for him to obtain correct information, (*c*) will not prevent the interference of the Court to obtain relief.

These, however, are rules which are established in equity only; there is no confirmation which in law will remove the effect of fraud, nor can the lapse of time, or long acquiescence be replied to a plea of fraud, though such may undoubtedly have weight with a jury when considering what is charged to be a fraudulent transaction. On summary applications to the courts where they act discretionary, equitable rules are acted upon, and then indeed, as will be seen hereafter, the lapse of time has been thought a sufficient answer to such complaints.

Of fraud as
affecting third
parties.

Thus far of fraud as affecting one of the parties; in the next place shall be examined fraud as affecting third persons, who for the most part are creditors.

The grant of an annuity, or the purchase of one by an insolvent, either is a fraud intended by the grantor or purchaser, or it is what the law has determined to be such, from its necessary effect. To prevent any discussion as to the intention of the parties, the statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4, have expressly enacted, that conveyances and grants made voluntarily, and without a valuable consideration, shall be void as against the grantor's creditors or subsequent purchasers. Even though the latter have notice of a previous conveyance, and there be no fraud intended,

(*a*) *Gowland v. De Faria*, 17 Ves. 20.

(*b*) *Roche v. O'Bryen*, 2 Ba. & Be. 342.

(*c*) *Murray v. Palmer*, 2 Sch. & L. 487.

yet if the consideration have been voluntary only, and not valuable, it falls within the prohibition of the latter statute, for the law here infers a fraud. (a) At the same time, the first grantee may show that the subsequent purchase is colorable only to avoid his conveyance, and that the consideration alleged for the purchase was never paid, or was grossly inadequate. (b)

A good consideration only will not prevent the operation of these acts, it must be valuable to have that effect. The distinction between the two has been already expressed. With regard to money, the commonest instance of a valuable consideration, few questions ever arise with creditors; if the price be fair no objection can be made, but if it be grossly inadequate, a suspicion may be excited that the parties intend to defraud the creditors, which, if strengthened by other circumstances, may cause the transaction to be investigated, and ultimately vacated. (c) The observations which have been already made on the subject of adequate price should be attended to in discussing a charge of fraud, alleged by creditors on the sale of property by an insolvent.

In regard to marriage, that is a consideration which cannot be estimated, and there does not appear to be any case in which a settlement by a husband before marriage upon his wife has been vacated at the instance of his creditors, though the provisions of the settlement may be fraudulent as respects them. But in post-nuptial settlements it is otherwise. There the creditors have the power of controlling the conduct of the husband, and preventing his settling his property on his wife.

The case of *Fitzer v. Fitzer* (d) is a very strong illustration of this principle, and somewhat harsh in its application. There Lord Rivers by his will gave an annuity of 50*l.* to the plaintiff, who in 1726 married the defendant Fitzer; in 1728 they agreed to part, and by a deed of separation the husband covenanted to allow her 14*l.* per annum out of his

(a) *Evelyn v. Templar*, 2 B. C. C. 148. *Doe v. Manning*, 9 East, 59.

(b) *Doe d. Parry v. James*, 16 East, 212.

(c) *Copis v. Middleton*, 2 Madd. 410.

(d) 2 Atk. 211.

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own estate, 24*l.* more to be paid quarterly out of the annuity of the 50*l.*, and 12*l.* a year to his daughter by the plaintiff for her maintenance. A bill was brought against the husband and a creditor of his since the execution of the deed of separate maintenance, who was also the assignee of the husband under an insolvent debtor's act, to have the trusts of the deed executed. Lord Hardwicke, however, held the deed as voluntary, being post-nuptial, and therefore a fraud upon the creditor.

But in a later case of *Hobbs v. Hull*, (a) where a man separated from his wife, and living in a state of adultery, settled an annuity upon her, this was held good against his creditors, because by his conduct he had given her a right to apply to the Spiritual Court for a divorce, in which case he would have been decreed to pay her alimony; and as he was liable to this, there was no objection to his providing for this liability.

Though only articles have been entered into before the marriage, and the deed be not executed until after, yet it is sufficient; and a slight variance between the articles and the settlement will not invalidate the transaction. (b)

It is only where a man is insolvent at the time of its execution that a post-nuptial settlement can be avoided by these statutes. Subsequent creditors cannot impeach it. (c) And if there be a covenant on the part of the trustees to indemnify the husband against the debts which the wife may contract, it will be a valuable consideration to support the deed, though the husband may be indebted at the time. (d)

The previous cases only referred to the marriage of the party granting; but the marriage of another person, if induced by the promise of the grantor, will be a valuable consideration to support the grant. As where a brother grants an annuity to his sister on her marriage. (e) And

(a) 1 Cox, C. 445.

(b) *Brunsdon v. Stratton*, Pr. Ch. 520.

(c) *Middlecomb v. Marlow*, 2 Atk. 520; *Battenbee v. Farrington*, 1 Swa. 106.

(d) *Stephens v. Olive*, 2 B. C. C. 9; *Worral v. Jacob*, 3 Meriv. 256.

(e) *Tannet v. Byne*, 1 Sim. 160.

even where there is no kindred between the grantor and the grantee, the grant on the marriage of the latter was held valid. (a) This is confined however to antenuptial settlements, for where a marriage was supposed to be invalid, and previous to a re-solemnization the wife's father executed a bond to secure her an annuity, being solvent at the time, Lord Eldon held that there was not a sufficient consideration to support the bond against his creditors on his bankruptcy, as the first marriage was held to be good. But the husband's father having agreed to settle an annuity upon him as a consideration for the settlement on the wife, the Lord Chancellor held the grant to be valid. (b)

The relinquishment or acceptance of any engagement by the grantee, whereby he is deprived of any pecuniary advantage, may form a valuable consideration against creditors, as was seen in *Dr. Young's case*, stated in p. 150.

But where the grantee alleges that the consideration for the grant was some existing debt due from the grantor, he will be required to prove that he had such a demand as a court of law would enforce. (c) And in the case of a mere liability, the extent thereof must be certain and definite. For in *Cray v. Rooke*, (d) a bond to secure an annuity after cohabitation, and given as a compensation for the loss of chastity, was held to be voluntary, and was postponed in the administration of an intestate's estate to simple contract creditors.

Yet there are some cases, where, though a valuable consideration be given for the grant, it will be set aside, because it operates as a fraud upon others. These are where grants are made by bankrupt traders or other insolvent persons to some particular creditor, in exclusion of the others. If a trader grant or transfer an annuity to his creditor in satisfaction of the debt, and in order to give to such creditor an undue preference, by the

Of contracts
in fraud of other
creditors.

(a) *Power v. Bailey*, 1 Ba. & Be. 49.

(b) *Ex parte Hall*, 1 Rose, B. C. 30; 1 Ves. & B. 112.

(c) *Peacock v. Monk*, 1 Ves. S. 127.

(d) *C. T. T. 153*. See also *Gilham v. Locke*, 9 Ves. 612.

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spirit of the Bankrupt Acts such grant is void. So if it be given to induce a creditor to sign a composition deed, whereby other creditors do not obtain the full amount of their debts.

And though there be no bankruptcy, but an insolvent, whether trader or not, grants or transfers an annuity to a creditor, intending to give him an undue preference, such grant is void, if the insolvent be imprisoned within three months after, and apply to the Insolvent Debtors' Court to be discharged. (a)

Again, if it be granted in consideration of a creditor consenting to withdraw an opposition which he had commenced to an insolvent's discharge, (b) or to sign a bankrupt's certificate, it would be fraudulent, and the grant would be avoided. (c)

Thus also it was decided in the House of Lords that an agreement between an insolvent debtor and his assignee, by which an estate of the insolvent was to be held in trust by the assignee, to pay out of the rents and profits annuities to the insolvent and his wife, and the surplus towards the extinction of the debt owing to the assignee, was void on the ground of public policy. (d) "It was," said Lord Redesdale, "a contrivance to provide for the family of the insolvent, and the assignee, as one of his creditors, at the expense of the other creditors. On grounds of public policy it is necessary to declare that such an instrument is void. It is a deed contriving a fraud against creditors, to which a trustee for them is a party."

The above discussion seems to be sufficient for this treatise on the subject of fraud as connected with the grants of annuities. A more elaborate examination, however valuable, could not be here introduced consistent with the other matter, which demands attention.

Force and duress will avoid a grant.

It may be a convenient opportunity to observe that force

(a) 7 Geo. IV. c. 57. sect. 32.

(b) *Murray v. Reeves*, 8 B. & C. 421.

(c) 6 Geo. IV. c. 16. sect. 125.

(d) *M'Neil v. Cabill*, 2 Bl. P. C. 226.

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and duress will be a good objection to a grant. Where it can be proved that the grantor was compelled to execute an instrument under duress or terror, such as would operate on the mind of a man of ordinary courage, it will be declared void by any court of law; though strong proof will be required to vacate acts of deliberation. This defence, however, like fraud, only renders the deed voidable not actually void; but according to Perkins, (a) where a grant is void for duress, the grantor, his heir, or assignee of the land, may treat the grantee as a trespasser, if he distrain.

Effect of parental coercion.

It has been shown that equity endeavours to restrain contracts between persons standing in particular relations towards each other; and it has been stated that this arises in a great measure from the opportunity of fraud which is afforded by such situations. There is another reason for this principle, sometimes applicable, and that is the degree of coercion which such relations are apt to create, and which destroys one of the necessary requisites of all contracts, namely, freedom of will. Thus filial affection is sometimes disturbed by the excessive exercise of parental authority, and, the guardian becoming the master of his ward, gifts are made to relieve the child or the ward from an irksome restraint through the impulse of terror and coercion, rather than of affection and regard. It need hardly be added, that such gifts will not be supported, but the courts will vacate the transaction when brought before their cognizance. Where the son of a freeman of London released his interest in his orphanage, part to his father, whose unkind usage had reduced him to great necessities, for an annuity of 50*l.*, Lord Hardwicke held that such a release, so extorted, could not be supported. (b)

At the same time the law will not interfere with an act of affection, springing from feelings of gratitude or duty, freely and voluntarily executed. As in *Blackborn v. Edgeley*, (c) where a large fortune had been left to a son, his

(a) Grants, sect. 16.

(b) *Heron v. Heron*, 2 Atk. 160.

(c) 1 P. W. 607.

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father being passed over; the latter prepared a bond to secure an annuity of 120*l.* to him, which the son declined to execute, saying it was more reasonable that his father should trust to his honour. The father left the bond with him, saying if he would not sign it he might let it alone. The son afterwards, in his father's absence, being about to travel, signed it, and directed it to be delivered to his father. Lord Chancellor Cowper, in his judgment, said, "The words might be spoken in such a manner as to amount to a threatening, and with a design to intimidate the son; but it might be otherwise;—and that, for aught that appeared to the contrary, it was the son's free act, and what he thought himself obliged in honour to do; therefore, without any proof to impeach it, it should not to be set aside."

Consideration
illegal for breach
of statutory law.

The next head of inquiry is where the grant is made in violation of some express statute, in such case it is illegal, and therefore void. It is impossible to enumerate all the different cases prohibited by statutes, the breach of which may render the grant void, but the most familiar instances shall be examined, which are with reference to usury, gaming, sale of public offices, bribery, simony.

1. Of usury.

I. Of Usury.—The loan of money on usurious interest was prohibited at common law, but it was not defined what was usurious interest. Various statutes have fixed a certain rate, above which none is allowed to be taken, and these rates have been gradually diminished according to the increase in the monied capital of the country. Thus the 37 Hen. VIII. c. 9, and 13 Eliz. c. 8, fixed the rate at ten per cent.; the 21 Jam. I. c. 17, reduced it to eight per cent.; the 12 Ch. II. c. 13, to six per cent.; and, lastly, 12 Ann. c. 16, to five per cent. which has continued to be the legal rate of interest.

The last statute enacts, "That no person upon any contract shall take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of 5*l.* for the forbearance of 100*l.* for a year, and that all bonds, contracts and assurances whatsoever made for the payment of any principal or

money to be lent or covenanted to be performed upon, or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5% in the hundred, shall be utterly void."

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Now as it cannot be denied that an annuity, where money is advanced as the consideration, is a mode of raising money, it early became a question whether the transaction did or did not fall under the prohibition contained in these statutes. But one principle was admitted in the construction of the usury laws, namely, that they do not apply where the principal sum advanced is risked, or is not to be returned, and therefore that a contract for the paying of a higher rate of interest than is fixed by these different acts does not become invalid in such cases. In an annuity granted during the continuance of a life the principal is risked, because the life may drop before it has been returned by the annual payments. Hence this contract falls within the exception, and a higher rate of interest is not prohibited. At the same time where there is no risk in the contract, but the principal is secure, and this mode is merely adopted as a device for a loan, the law will not allow the statutes to be evaded, and the case will fall within the prohibition. In *Chesterfield v. Jansen* (a) Mr. J. Burnet expressed the result of the cases thus—"Suppose a man purchase an annuity at ever such an under price, if the bargain was really for an annuity, it is not usury. If on the foot of borrowing and lending money it is otherwise, for if the court are of opinion the annuity is not the real contract, but a method of paying more money for the reward or the interest than the law allows, it is a contrivance that shall not avoid the statute by giving the avarice of one kind of men the opportunity of preying on the necessities of another, 4 Leo. 208; 2 Lev. 7. *K. v. Drury*. Noy, 101; Cro. El. 642, 643."

A life annuity is
not usurious.

It is not necessary that the principal should depend upon the existence of a life only, there are other contingencies which may also put it in jeopardy. The profits of

Annuity paid to
a partner in
trade.

(a) 1 Atk. 340.

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trade are not controlled by the statutes of usury, because among other reasons the losses must also be considered, and the consequent risk which the trader undergoes of his capital. This is illustrated by a case in the Court of Chancery of *Fereday v. Hordern*. (a) * There one advanced a sum of 4000*l.* to three partners in a trade, and was admitted into the partnership. In lieu of profits he was to have clear 550*l.* per annum, and the sum of 4000*l.* at the determination of the partnership. The other three partners were to conduct the business in their names alone, and they were to indemnify him from the debts incurred therein. And he was at liberty to retire on giving twelve months notice, when his 4000*l.* was to be repaid to him. Lord Eldon held that this was not usurious, since although the party might not be responsible for the partnership debts as between himself and his co-partners, yet he was as to all the rest of the world. Here, therefore, the principal was risked, inasmuch as, in fact, it became part of the capital invested in trade.

A case occurred before Lord Mansfield in 1775, which also supports this position; it is *Bloxam and others v. Pell and Brooke*, and is cited by Serjeant Davy in his argument in *Grace v. Smith*. (b) Pell and Brooke entered into partnership for seven years, and after a year dissolved partnership, it being agreed that Brooke should give a bond for the capital brought in by Pell and five per cent. interest, and should also pay him 200*l.* per annum for six years, provided Brooke lived so long, *as in lieu of the profits of the trade*. Lord Mansfield held that Pell was a secret partner. "This," he said, "was a device to make more than legal interest of money, and if it was not a partnership it was a crime, and it should not lie in Pell's mouth to say it is usury and not a partnership."

But it must appear that the annuity is to depend upon the profits of the trade, for where it was certain and was charged upon the estate of the remaining partner, it was considered by the court that a jury were warranted in

(a) Jac. 144.

(b) 2 Sir W. Bl. 999.

finding that there was not a partnership, where they were of opinion that the annuity was not to be paid out of the profits. (a)

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Another case, illustrative of this exception out of the Statute of Usury, has lately occurred in the King's Bench. (b) Gilpin and Enderby, by deed, covenanted to become partners for ten years, and that E. should advance 20,000*l.* as part of the capital for carrying on the business, and that G. should find a like sum, that E. should, during the continuance of that term, have, out of the profits, if sufficient, if not, out of the capital, 2000*l.* yearly for his share of the profits. G. covenanted that 20,000*l.* should be repaid at the end of the term, and to indemnify E. against all losses and debts. To an action on this covenant by E. it was pleaded that this was a device in pursuance of an usurious agreement. The jury negatived that plea, and judgment was given for the plaintiff by the Court of Common Pleas. (c) It was held, on a writ of error in the King's Bench, that the deed must, after that finding, be taken to disclose the real intention of the parties, and did not disclose a case of usury.

"By this deed," said Lord Tenterden, "E. undoubtedly made himself answerable as a partner to all strangers, though he might not be answerable as between himself and Gilpin. And if the deed discloses the real facts and the intention of the parties to it, this is not the case of a loan of money by E. to G., but a contract of partnership between them of a peculiar kind. If the deed does not disclose the real facts and the intention of the parties, but was executed only as a contrivance to cover a loan of 20,000*l.* for ten years at 10*l.* per cent. the deed was undoubtedly void, but this is a fact which ought to be found affirmatively by a jury, to enable the court thereupon to declare the deed void. No such fact has been found, and

(a) *Grace v. Smith*, 2 Sir W. Bl. 998. See also *Young v. Axtell*, cited in *Waugh v. Carver*, 2 H. Bl. 242; and *Morse v. Wilson*, 4 T. R. 353.

(b) *Gilpin v. Enderby*, 5 B. & A. 954; 1 D. & R. 570.

(c) 5 Moore, 571.

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Inadequacy of
price will not
render an an-
nuity usurious.

in the absence of such a finding, we must consider the deed as speaking the language of truth. And so considering it, we cannot pronounce it to be void. The partnership as constituted by this deed may be, and probably is, of an unusual kind, but that circumstance will not authorise us to say that there was in truth no partnership; and if there was a partnership, there is no loan of money by E. to G. and no usury."

An annuity or rent charge becoming the object of a sale and purchase, a mere inadequacy of price will not render it a usurious contract; if a sale be really intended, and there be no communication for a loan, nor any intention in the mind of the parties to enter into such a contract. Lord Hardwicke, in the above case of *Chesterfield v. Jansen*, (a) observed, "A man may purchase an annuity on as low terms as he can, but if he sets out at first with borrowing a sum of money, and then turns it into the shape of an annuity afterwards, this is a shift and an evasion to avoid the statutes." In support of this distinction *Murray v. Hardinge* (b) may be referred to. There a clergyman applied to his attorney to obtain a loan of money. His attorney told him it was impossible, but recommended that he should grant an annuity. Having assented to this, the plaintiff was bound to advance 120*l.* in the purchase of an annuity of 20*l.* during the defendant's life, redeemable at the end of five years on payment of 109*l.* 10*s.* And there was no communication with her about a loan in any shape, but merely about the purchase of a redeemable annuity. The Court of Common Pleas decided that this was not a usurious transaction, that there was no communication about a loan with the supposed lender, that the principal was risked, and the clause for redemption was not necessarily a mark of usury. So also in the early case of *Fountain v. Grymes*, (c) the grantee refused to lend the

(a) 1 Atk. 340. See also the judgment of De Grey, C. J. in *Murray v. Hardinge*, 2 Bl. R. 869.

(b) Sir W. Bl. 859; 3 Wils. 390.

(c) Cro. Ja. 252; 1 Buls. 36. See also Fuller's C. 4 Leo. 208.

sum required, but offered to give that sum in consideration of an annuity on the life of his wife and son. The court held this to be an absolute bargain, and the principal not being to be repaid was hazarded, consequently the contract was not usurious.

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And in like manner in Finch's case (*a*) the grantor came to borrow money on interest, the grantee refused, but said he would only let him have it by way of annuity or rent. Whereupon for 566*l.* the rent of 120*l.* was secured for twenty-three years. This was held not to be usury, but a mere bargain; the parties rejected the contract for a loan, and the annuity was purchased *bonâ fide*. In Dr. Goad's (*b*) case, cited in the last case as reported in Croke, it is said where there is a communication for a loan, and it is corruptly agreed to sell an annuity at a price so large as that the statutes may be evaded, it is still usury.

It is not easy to understand why the change of the contract from a loan, where there is no risk, to an annuity where the principal is really hazarded, can affect the character of the transaction so as to render it usurious, even though the object of the parties may have been to obtain a higher rate of interest than the law allows. Indeed in modern cases it does not appear that this distinction has been acted upon.

There is another instance where the purchase of a rent was allowed, though more than legal interest was obtained thereby. It is in 5 Co. R. 69. (*c*) There one A. G. advanced 100*l.* to T. W., who, on the 17th July, 1579, granted a rent of 20*l.* to be paid quarterly, the first payment to be made at Christmas, 1580, provided that the rent should cease if the 100*l.* were paid in July, 1580. It was objected that this was usurious, and therefore void. But the Court of King's Bench held that it was a plain bargain and purchase of the rent, and no usury. It was in the election of the grantor to have paid the said 100*l.* and to have frustrated the rent, so that the grantee is not assured

(*a*) 1 And. 121; Cro. E. 27.

(*b*) Cro. E. 27. See also *Symonds v. Cockerill*, Noy, 151; *Brownl.* 180.

(*c*) *Burton's C.* See *Brendloss v. Phillips*, Cro. E. 895.

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There must be
an actual risk
of the principal.

of any recompence for the forbearance of his 100*l.* for a year, and the said rent of 20*l.* was but as a penalty to the grantor and assurance to the grantee for the payment of the said 100*l.*

The principal must however be actually risked, for where the risk is collusive, or weak and colourable, the annuity cannot be supported.

Thus in *Roberts v. Tremayne* (a) there was no actual risk of the principal, but the interest depended upon the chance of a young woman living two years; for she lent 150*l.* on this contract, that the borrower should grant her a lease of land for sixty years, commencing two years after the date, with this provision, that the lease should be void if the 150*l.* should be paid at the end of the two years. So far, then, the principal was secure either in the enjoyment of the land, or in the repayment. But it was also agreed, that for these two years' loan the yearly rent of 22*l.* 10*s.* should be paid quarterly to the lender if she should live during the two years, which was at the rate of 15 per cent. And the court held that this was a usurious bargain, for by intendment she might live so long, and it was an apparent possibility that she should receive the consideration. Besides, this was not a case where the principal was in jeopardy, but only the interest. In *Richards v. Brown*, (b) the circumstances of which case are too complicated to be stated here, there was merely the contingency of a hale young man's living three months, and the Court of King's Bench thought that that would not remove the operation of the statute.

Indeed, the lender of the money must take the whole of the annuity risk upon him, otherwise the courts will be inclined to treat the transaction as a loan, and not an annuity. Such was the opinion of Lord Redesdale in a case (c) where a rent was assigned for 300*l.*, subject to redemption for 350*l.*, and at the same time the assignee advanced 200*l.* on bond, and a bond of 700*l.* was taken to

(a) *Cro. Ja.* 507; 2 *Roll. R.* 47.

(b) *Cowp.* 776.

(c) *Verner v. Winstanley*, 2 *Sch. & L.* 394.

secure the redemption and due payment of the rent. He held this to be a mortgage, and that an account should be taken as for a debt of 500*l.* and interest, and that the receipts on the footing of the annuity should be set off.

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As it has already been stated, if there is no hazard of the principal, but it is by the contract to be returned, the transaction may be usurious, whatever be its form. And hence arose the question as to annuities made redeemable. In *Stokes v. Verrier* (a) Lord Nottingham intimated an opinion, that a rent charge granted to one and his heirs, redeemable on notice by the grantor or his heir by repayment of the consideration-money, would be usurious if the annual rent exceeded the legal interest. Here the redemption was treated as a thing certain, and it was at the option of the party who advanced the money. (b) The question, however, is determined otherwise where the power of redemption is in the option of the grantor; though there has been a difference of opinion upon this subject. Lord Hardwicke, in *Floyer v. Sherard*, (c) says indeed, "This is a sale for an annuity absolutely and not redeemable; but when they are redeemable, the court looks upon it as an evasion of the statute of usury, and only a loan for money." And he used similar expressions in *Lawley v. Hooper*. (d) But, notwithstanding this opinion, C. J. De Grey, in *Murray v. Hardinge*, says, "If a power of redemption be given, though only to one side, it is a strong circumstance to show it a loan, as in the case of *Lawley v. Hooper*. But that alone will not be conclusive." And accordingly in that case, as already stated, the annuity, though redeemable, was supported. In *Irnham v. Child* (e) Lord Thurlow says expressly, "That to sell an annuity, and make it redeemable, is not usury, because it is not a loan." And in *Lord Carbery v. Weston* (f) it was held by the House

The power of redemption does not render it usurious.

(a) 3 Swa. 634.

(b) On which see *Chippendale v. Thurston*, 1 M. & M. 411.

(c) Anbl. 19. And see *Rex v. Drury*, 2 Lev. 7.

(d) 3 Atk. 279.

(e) 1 B. C. C. 412.

(f) 1 B. P. C. 429, ed. To. See also *Verner v. Winstanley*, 2 Sch. & L. 394.

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of Lords that a rent charge on lands of an insufficient value, redeemable by the grantor on giving notice, was not usurious.

When it is considered that the redemption being at the option of the grantor, there is still the risk whether the annuitant will live until he exercise that option, and whether the grantor will ever choose to redeem at all, it is impossible to say that there is much less hazard in a redeemable than in an absolute annuity.

Where 2000*l.* was advanced on the terms that it should be repaid, with 200*l.* for interest, at the end of a year, or else an annuity of 250*l.* on the borrower's life should be granted; the Master of the Rolls held the contract to be valid. He said, "This was all contingency, the defendant not being obliged to pay it at the end of the year, and the annuity payable only during his own life, and then the money to be lost and not repaid. Certainly if the borrower of money only agrees to pay an annuity determinable as this is, it is not an usurious contract unless it was on a contingency or condition impossible, or so remote as to induce the court to give it another consideration."^(a) This case is somewhat analogous with Burton's case, cited above.

Nor the power
of the grantee to
insure the an-
nuitant's life.

But it is urged that the principal need not be in jeopardy, because the grantee may insure the life of the annuitant. At least then the insurance must be added to the rate of interest allowed by the law, and that is a sum which fluctuates with the condition and situation of different persons, so that few could tell whether their contract was usurious or not. But it may be answered that this insurance is no part of the original contract between the parties, but merely a collateral provision discretionary on the part of the grantee. Referring to this argument Mr. J. Blackstone in his judgment in *Murray v. Hardinge* says, "And though it is said he might have insured at 5 per cent., yet that can only be done for a single year at a time. Here he undertakes to be his own insurer for a period of eight years together." Perhaps it might be replied that there is no restraint on an

(a) *Worthy v. Pitt*, 1 Ves. S. 164.

insurance for more than a single year. Mr. B. Bayley in a late case (a) has also pointed out this answer; the statute applies to money lent, it must be contemplated that the party who borrows shall be the party who returns it, and if a third person is to repay it, as the insurance office is in this case, though by the instrumentality of the lender, that is not within the statute.

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But supposing it to be a part of the contract that the grantor should insure the annuitant's life, and the amount of the insurance be paid over to the grantee; it must be admitted that here there is no risk of the principal beyond that of an ordinary loan. Besides the argument adduced above by Mr. J. Blackstone, may be cited the observation of Mr. Comyn, (b) who says, "Supposing it to be conceded that the insurance effected on the life of the grantor by the annuitant," (*or on the life of the annuitant by the grantee*) "will not render the annuity usurious, it will be difficult to contend that it would be rendered usurious by an insurance for the benefit of the grantee effected by the grantor. For as in both cases it is in fact the grantor who pays both the annuity and insurance, it seems hard to say that the usury is incurred by his paying them in two sums, when it would not have existed if he had paid them in one gross sum."

Nor the
grantor's cove-
nant to insure.

And in a very late case, (c) the Court of Common Pleas refused to set aside a warrant of attorney, given to secure an annuity granted on four lives, with a covenant on the part of the grantor to insure the principal sum within thirty days after the expiration of the third life. It was urged that it was a usurious contract, for the principal was never risked. But the Court held that it did not appear to be a loan, but that the hazard was considerable; that even if the insurance were effected, there are clauses in policies which induce considerable hazard; and that the mode of repayment was too precarious for the Court to say

(a) *Holland v. Pelham*, 1 Tyrw. 443; 1 C. & J. 580.

(b) *On Usury*, p. 69.

(c) *Ex parte Naish*, 7 Bing. 150.

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the parties intended a loan. They therefore dismissed the rule for setting aside the warrant of attorney with costs. The grantor, however, tried the question again in the Court of Exchequer, (a) by pleading that the agreement was usurious to an action of covenant on the annuity deed. But, after argument, that Court held, agreeably with the decision of the Common Pleas, that the covenant for the insurance did not make the transaction usurious. The argument of Mr. Comyn was adopted, that it can make no difference whether the grantor pay the insurance, and therefore his annual payment be less, or the grantee, and then the annual payment will be higher.

Whether an annuity for a term certain be usurious.

There remains one other case only for consideration on this head, namely, where the annuity is granted for a term certain. Here the principal is not risked, because it will be returned by the aggregate of the annual payments. In the old authorities (b) this doctrine is laid down; that where the annuity or rent is purchased, and there is no contract for a loan, it matters not how cheap a bargain the purchaser can obtain, for being a purchase it is not within the statutes. Certainly at the present time no objection is ever made to the purchase of ground rents on long leases, at whatever sum they are bought, and it may be observed that the repayment of a large sum by small instalments is very different from the return of the gross sum at once, which difference is not easily estimated. However, the more modern authorities seem to be against the validity of such annuities. (c)

In *Doe v. Gooch*, (d) Mr. J. Bayley, referring to the case of an annuity secured on freehold, says, "In that case the principal is in hazard from the uncertain duration of life. Here it is in the nature of an annuity for years; and there is no case in which an annuity has been held not to be

(a) *Holland v. Pelham*, 1 Tyrw. 438; 1 C. & J. 576.

(b) *Rowe v. Ballasys*, 1 Sid. 282, not, however, a strong authority. *Rex v. Drury*, 2 Lev. 7.

(c) Comyn on Usury, p. 79. See *James v. Oades*, 2 Vern. 402.

(d) 3 B. & A. 666.

usurious, where on calculation it appeared that more than the principal together with legal interest is to be received."

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And accordingly the case of *Fereday v. Wightwick* (a) has been very recently decided. There the defendant claimed, as the purchaser of an annuity of 66*l.* 18*s.* for a term of eleven and a half years. It was secured on shares in a mining company, and the consideration paid for it was 4000*l.* It was to be paid half-yearly, and the purchaser received twenty-three notes, being each for a half-year's payment, payable respectively at the successive times when the half-yearly instalments of the annuity would become due. It appeared in evidence that the twenty-three half-yearly payments would pay the sum of 4000*l.* together with interest at nearly twelve per cent. per annum.

It was objected that this was usurious, and the opinion of Mr. J. Bayley was quoted. On the other hand, the cases of *Finch v. Tanfield*, *Cotterel v. Harrington*, and *Rowe v. Bellasys*, were cited. And it was urged that this was only for the purchase of an annuity, and not for a loan of money, about which there had been no communication.

The Master of the Rolls. "With respect to this question of usury, I shall not refer to the old cases which have been cited. This, in effect, is an agreement to repay the principal sum of 4000*l.* with interest, by twenty-three instalments, and as it appears that the interest thus paid will exceed legal interest, the transaction is plainly usurious."

II. Of Gaming.—To prevent the mischievous effects of this bad passion, it is enacted by the 9 Ann. c. 14, "that all conveyances granted or executed, where the whole or part of the consideration shall be for money or other valuable thing, won by gaming or playing at cards, dice, table, tennis, bowls, or other game, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for reimbursing or repaying any money knowingly lent or advanced at the time and place of such play, to any persons

(a) 1 Russ. & M. 50.

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so gaming and betting as aforesaid, or that shall during such play so play or bet, shall be utterly void."

And where such conveyances shall incumber any lands, &c. they shall devolve to such persons as should have been entitled to them in case the grantor had been dead.

Hence the grant of an annuity to satisfy a debt contracted by gaming, will be void by the provision of this act. Accordingly in a case of *Jeffreys v. Walter*, an annuity of 100*l.* was held void, which was granted under these circumstances. One Parsons betted two sums of twenty-five guineas, on a game of cricket, with Jeffreys, and lost them: he agreed that if the sum of 447*l.* 10*s.* were added, so as to make up 500*l.* he would grant an annuity to the plaintiff of 100*l.* during their joint lives. This was done, and Walter was the surety, being bound in a separate instrument. The Court of King's Bench were of opinion that the game of cricket was within the act, and that if Parsons's bond was bad, the defendant's was likewise. (a)

3. Of the sale
of public offices.

III. Of the sale of public offices.—This is restrained by the two statutes of the 5 & 6 Edw. VI. c. 17, and the 49 Geo. III. c. 127. By the former, the sale of offices touching or concerning the administration of justice, the receipt, controlment, or payment of the king's treasury or customs, or the keeping of his castles, or touching any clerkship in any court of record, wherein justice is to be administered, is prohibited; and the bargain and assurance is made void. This prohibition is extended by the latter act to a number of offices therein mentioned, embracing generally all public places and employments, and all commissions, civil, naval, and military, as well in England as abroad.

The former act, however, did not interfere with the power of appointing a deputy, where that is allowed by the nature of the office. It was therefore determined upon this act, that where a person in possession of an office appoints a deputy, and contracts to receive from him a certain annual sum, the provision of the statute is violated. But if the

(a) *Jeffreys v. Walter*, 1 Wils. 220.

agreement be for the payment of a sum out of the profits, and dependant thereon, or for a portion of a fixed salary, it was perfectly legal. (a) This decision is incorporated in the latter act, s. 10.

And s. 11 allows an annuity to be reserved out of the fees of any office to any person who formerly held the same, provided the amount so reserved, and the circumstances and the reasons under which the same shall be granted, be stated in the instrument of appointment.

It has been lately held that a clerk to a deputy registrar of the Prerogative Court at Canterbury, removable at pleasure, was not a judicial officer, within the meaning of the former act. (b)

There is also an exception in the statute 5 & 6 Edw. VI. c. 17, of all offices of which any person is or shall be seised of inheritance. It was decided that this does not extend to offices in which the King has the inheritance, but grants out an estate of freehold. (c)

When the grant is void as being in violation of this statute, if the illegality do not appear on the instrument, it must be pleaded specially. Where the condition of a bond was to pay 40*l.* so long as the obligor should have and exercise the office of registrar, the Court held it not within the statute; if it had been to pay it for the office, it would have been void. (d) In a late case the condition of a bond recited the appointment of the obligor as the obligee's deputy, in consideration of a certain annuity to be paid to the latter, and then contained an engagement to pay that annuity. The defendant pleaded that it was to be paid *at all events*, without reference to the amount of fees received, and the jury found that plea to be true. The Court held, that supposing this to be inconsistent with the statement in

(a) *Godolphin v. Tudor*, Salk. 468; 6 Mod. 234; 1 B. P. C. 135; *Gulliford v. Cardonell*, Salk. 466; 12 Mod. 90.

(b) *Aston v. Gwinnett*, 3 Y. & J. 136.

(c) *Huggins v. Bainbridge*, Willes, 241.

(d) *Betts v. Gale*, 3 Keb. 81.

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4. Of Bribery.

the bond, which they did not admit, still it was an illegality, which was pleadable, and avoided the bond. (a)

IV. Of Bribery. Not only the common law forbids the bribing of any individual to perform his public duty, but with respect to one great duty, namely, the exercise of the elective franchise, that prohibition has been enforced by strict statutory provisions. By 2 Geo. II. c. 24, if any person having or claiming to have a right to vote in the election of members of parliament, shall receive or take any money or other reward by way of gift, loan, or other device, to give his vote or to forbear or refuse his vote in any such election; or if any person shall, by any gift or reward, corrupt or procure any person to give or forbear to give his vote in any such election, such person shall forfeit 500*l*.

And by 49 Geo. III. c. 118, the giving any gift or reward to any person to procure the giver to be returned member of parliament, is subjected to a penalty of 1000*l*. on the person giving, and 500*l*. on the person receiving the bribe.

There are also other statutory prohibitions upon the receipt of bribes by persons filling offices in different public departments, as in the Excise, 7 & 8 Geo. IV. c. 53. s. 12; in the Customs, 6 Geo. IV. c. 106. s. 9. 29; in the Collection of Spirit Duties, 6 Geo. IV. c. 80. s. 145.

The securities which may be given in cases to which these statutes apply, are not expressly rendered void, but it is a general rule that where contracts are prohibited under a penalty, they are void in law, and the securities for enforcing them are invalid. (b) Therefore an annuity, if granted in consideration of the grantee's voting for the grantor or procuring his return, would be illegal and null.

5. Of Simony.

V. Of Simony. The stat. 81 Eliz. c. 6. enacts that if any person or persons or bodies corporate shall for money, reward, gift, profit, or benefit, directly or indirectly present or collate any person to any benefice with cure of souls,

(a) *Greville v. Atkins*, 9 B. & C. 462; 3 M. & R. 372.

(b) *Bartlett v. Vinor*, Carth. 252.

dignity, prebend, or living ecclesiastical, or bestow the same for any such corrupt consideration, every such presentation shall be void, and the party taking and the party giving such reward is subject to a penalty. As is also the person admitting for any such consideration. By sect. 8, the corrupt resignation or exchange of any living for any pension or benefit, is subjected to a like penalty.

And by 12 Anne, c. 12, the corruptly procuring the next presentation to any ecclesiastical living for any profit, is declared to be void, and to be deemed a simoniacal contract.

It has been determined that where a patron took a bond from a parson, on presentation, to pay an annuity to the last incumbent's son while at Cambridge unpreferred, it was not simoniacal; otherwise, it is said, if it had been to the patron's son. Foster, J. vouched a case of the Earl of Sussex, where an obligation was made by the presentee to the patron to pay annually 5*l.* to the wife and children of the late incumbent. And notwithstanding great opposition to the contrary, the parson kept and enjoyed his living. (a)

But a bond given to an incumbent, securing him an annuity of equal value with the profits of the benefice, upon his resignation, in order that another person might be presented, who was to give a general bond of resignation, so that the patron's son, when of proper age, might be presented, was held to be within the 8th sect. above referred to, and therefore void. Lord Mansfield was inclined to think that the presentation must be corrupt to bring it within the statute, but said that the rest of the court were of opinion that that was not necessary, that every resignation for money was corrupt, and therefore this bond, being for money, was void. (b)

Besides these statutory prohibitions many contracts are restrained on the ground of illegality, as being in violation of rules of public policy. There is the same difficulty in enumerating all these as in those where the statute law has

Consideration
illegal as against
the policy of the
law.

(a) *Baker v. Mounford*, Noy, 142.

(b) *Young v. Jones*, 3 Dougl. 97.

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OF THE
CONSIDERATION.
Of Marriage
Brocage.

interfered, and a selection of the most prominent instances alone can be made.

I. Of Marriage Brocage. Where one who is a kinsman, or is connected in a fiduciary relationship, or even a stranger, in consideration of some personal benefit, bargains to induce a particular individual, over whom he possesses some influence, to enter into a marriage with another, such bargain is held to be against good policy, inasmuch as it tends to introduce fraud and imposition, and to prevent the due operation of affection, which can alone render marriages happy, and thereby beneficial to the community. These bargains are known technically by the name of Marriage Brocage; and though there is perhaps no instance where they have been examined in a court of law, and indeed Lord Talbot^(a) has stated that they are good at law, yet in equity they have been frequently canvassed and always there declared to be null and void. ^(b)

If an annuity therefore be granted in consideration of marriage brocage, it will not be supported in a court of equity. The principal case where such an annuity has been investigated is *Coles v. Gibson*.^(c) There a female servant had gained great influence over the mind of a young lady, her mistress, and had power to prevent or to promote her marriage. It was alleged that she had been bribed by a Mr. Bennett, the plaintiff, to use her influence in his favour. The marriage took place, previous to which a settlement was made by the intended husband and wife, in which they agreed to grant an annuity of 100*l.* to the defendant, and this part of the settlement was made irrevocable. A few years after the marriage a new grant of the annuity was made, and it was paid during the life of the wife. On her death a bill was brought by the husband to be relieved. It was urged for him that it was an illegal contract, being impolitic; that it was a case of brocage, and that there could be no confirmation of a transaction like

^(a) In *Law v. Law*, C. T. T. 140. But this is not quite certain.

^(b) *Hall v. Potter*, Shew. P. C. 76; *Scribblehill v. Brett*, 4 B. P. C. 144.

^(c) 1 Ves. S. 503.

this. The defendant admitted that if the consideration were marriage brocade, the annuity could not stand, but contended that it was granted by the wife as a testimonial of gratitude for the grantee's long services, and through an affectionate regard, and that there was no evidence of the illegal agreement. Lord Hardwick, in his judgment, doubted how far there could be a confirmation of such a transaction, but even though it might be confirmed, thought there was not sufficient evidence of a confirmation or release in the case to bar the relief. He acknowledged that if the consideration were that which the defendant alleged, the annuity might be recognized, but urged that the courts were always suspicious of transactions with servants in situations like that under consideration, and scrutinized them strictly. In the result he directed an issue to find whether the annuity or rent charge had been granted in consideration of the defendant's procuring or assisting plaintiff in his marriage, or for any other or what consideration.

In *Williamson v. Gihor*(*a*) it was decided by Lord Redesdale that a bond given by a man to another as a remuneration for assisting the obligor in effecting an elopement and marriage without the consent of the wife's relatives, although voluntarily, after the marriage, and without any previous agreement, was void.

As connected with the subject of marriage brocade, the attention is drawn to a species of fraud, which may pass under the name of nuptial fraud. It occurs where one whose consent is required to the marriage does assent thereto, or to the terms of the settlement entered into on such occasion, under the inducement of some private personal advantage, clandestinely secured by some other person. This is held to be a fraud upon the other contractors, and the engagement by which that personal advantage is attempted to be secured, will be vacated. Although there are various cases (*b*) upon this head, it will be sufficient to

(*a*) 2 Sch. & L. 357.

(*b*) *Turton v. Benson*, 1 Stra. 240; 1 P. W. 496; *Mertins v. Bennett*, Bunb. 336; *Palmer v. Neave*, 11 Vés. 165.

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cite one, *Lamleev. Hanman*. (a) There a mother, entitled to a rent of 10*l.* a year, charged on her son's lands, agreed on his marriage to release this 10*l.* in consideration of his paying her an annuity of 15*l.* By another instrument it was agreed that, notwithstanding this settlement, the rent of 10*l.* should still be payable; and to secure this payment, a leasehold estate belonging to the son was assigned to the mother. On the son's death his widow was relieved from an action upon this covenant, because it is the rule of law that that which is the open and public treaty and agreement upon marriage shall not be lessened or any way infringed by any private treaty or agreement.

Even where the object is to deceive some other party, whose concurrence in the marriage, although not necessary, is however beneficial to the married parties, a court of equity will not tolerate the clandestine transaction. Thus, where the intended wife was dependent upon an uncle, and the husband's father having offered to settle an annuity of 100*l.* upon her, she desired that 150*l.* might be inserted in the deed, to be shown to her uncle, though she agreed to require only 100*l.* *Sir Thomas Strange, M. R.*, compelled the grantor to pay the larger amount, which she afterwards claimed, in consequence of the fraud in the original agreement. (b)

Of Place Bro-
cage.

II. Of Place Brocage. As the public interest requires that all public offices should be filled by men capable of discharging their duties properly, it is necessary that those who have the power of appointing should be influenced by personal merit alone. Hence, where the persons appointing are induced by private motives of personal gain, or act upon the recommendation of others, instigated by similar motives, the public interest is in peril of being sacrificed, and therefore the law properly condemns all such bargains, and they have been classed as a species of commission under the opprobrious title of place brocage. To some

(a) 2 Vern. 466. 499.

(b) *Pitcairne v. Ogbourne*, 2 Ves. S. 375.

extent these practices are restrained by the statutes against the sale of public offices above referred to. But though the actual sale of an office would fall within those statutes, yet the corrupt recommendation is not provided for, and therefore it is left to the control of the common law. Accordingly, it has been determined, in the following cases, that the grant of an annuity on such a consideration would be illegal and void.

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Thus, in *Law v. Law*, (a) A. by the interest which he had with the Commissioners of Excise, procured for B. his brother, a supervisor's place in that office, and in consideration thereof B. gave a bond for the payment of 10*l.* per annum to A. as long as B. should continue in that office. B. died, leaving the annuity in arrear; A. sued the executrix of B. on the bond, and she brought a bill in equity to be relieved. For the defendant it was objected the statute of 5 & 6 Edw. VI. against the sale of offices, could not be pleaded, because it was made long before the excise formed part of the revenue.

But Lord Talbot, Chancellor, ordered the bond to be cancelled, and restrained the obligee from proceeding on it. "Bonds of this nature," he said, "are highly to be discouraged; merit, industry, and fidelity ought to recommend persons to these places, and not interest with the Commissioners, who, it is to be presumed, had they known from what motive the plaintiff at law applied to them on behalf of his brother, would have rejected him. The officer's giving money to a friend of the Commissioners for his interest, is altogether as bad as giving money, or a bond for money, to the Commissioners themselves, which, undoubtedly, would have been relieved against. The taking away from the officer what the Commissioners and the Treasury think to be but a reasonable reward for his care and trouble, and an encouragement to his fidelity, must needs be of the most pernicious consequence, and

(a) C. T. T. 140; 3 P. W. 392. See also *Hughes v. Statham*, 4 B. & C. 187; 6 D. & R. 219.

CHAP. V. induce him to make it up by some unlawful means, such as
OF THE extortion and corruption."
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So Lord Thurlow held, that a promise by a groom of the stole to recommend the grantor of an annuity to the King for his page, was a bad consideration for the grant, being contrary to good policy.^(a) And an annuity granted to induce the grantee to resign the situation of consul, was illegal, and still more so if the resignation was to be in favour of the grantor.^(b)

An agreement to pay an annuity out of the profits to the last holder of the office, without the knowledge of the persons appointing, was held to be void, where the grantee had procured himself to be superannuated in order that the grantor might be placed in his situation.^(c)

Where a bond was given to secure an annuity to the obligor's mother, and the condition recited, that by the recommendation of friends he had been appointed to succeed his father in the command of a government packet, but on the express condition of his making an allowance for the maintenance of his brother and sisters; it was objected, that as the packet was employed in the service of government in carrying the mails, this was an illegal engagement. It was answered, that the annuity was not granted to the person who had the appointment, nor to the party who had recommended. The Master of the Rolls retained the bill which was brought by the obligee against the executrix of the obligor, giving the plaintiff liberty to proceed at law to try the validity of the bond. He intimated doubts as to its legality.^(d)

In a subsequent case,^(e) the owner of a Post Office packet sold, with the privity of the Post Office, the packet to his son, but by a private arrangement he was to have the profits in reality, and allow his son an annuity of 200*l.*;

^(a) *Hannington v. Du Chatel*, 1 B. C. C. 124; 2 Dick. 124.

^(b) *Thrale v. Ross*, 3 B. C. C. 57.

^(c) *Parsons v. Thompson*, 1 H. Bl. 322.

^(d) *Hartwell v. Hartwell*, 4 Ves. 811.

^(e) *Osborne v. Williams*, 18 Ves. 379.

this agreement was held to be illegal and void, since the above cases of *Hartwell v. Hartwell*, and *Parsons v. Thompson*.

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But the statute 49 Geo. III. c. 126, s. 10, authorises the grant of an annuity, to be reserved out of the fees, to the person who formerly held it, providing the amount, and the circumstances and reasons under which it shall have been permitted, shall be stated in the instrument of appointment of the successor, who pays it.

But it will be observed that this is confined to the last holder of the office, and does not authorise a grant to his wife or children.

The East India Company having an exclusive right of trading with India, have been so identified with the government, that it has been decided, that a sale of the command of their ships is contrary to the rules of public policy, and all contracts of such sales have been held illegal. (a) Thus, among other cases, in *Thomson v. Thomson*, (b) a grant of an annuity to a captain of an India-man, in consideration of his resigning his command in favour of the grantor, was holden to be void; and, though the latter had obtained a compensation from the company, yet the Court of Chancery would not assist the grantee in his demand of a share of that compensation.

Sale of East
India Company's
ships.

This principle, however, which excludes the giving any pecuniary advantage to a person for his recommendation of the giver, seems confined to cases of public offices and trusts. For where an attorney resigned his business in that profession to two persons in consideration of the grant of an annuity, and covenanted to recommend them to his clients, the Court of King's Bench were of opinion that there was nothing illegal in the contract. (c) And in *Edgar v. Blick*, (d) Lord Ellenborough held, at *Nisi Prius*, that an agreement to procure a situa-

The principle
seems confined
to public offices
and trusts.

(a) *Blachford v. Preston*, 8 T. R. 89; *E. I. C. v. Neave*, 5 Ves. 181.

(b) 7 Ves. 470.

(c) *Bunn v. Guy*, 4 East, 190; 1 Smith, 1.

(d) 1 Stark. C. 464.

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tion for a medical man by the assignment of patients, by a third person, to whom a premium was to be paid, was not illegal. "I certainly," he said, "do not approve of selling patients, and handing them over as a species of property; it is indelicate, but I do not think that there is any thing criminal or immoral in it."

But where a private person has the disposal of an office, and the person holding it resigns under an agreement to recommend his successor, and to receive a certain portion as his moiety of the profits, that agreement must be communicated to the disposer of the office, otherwise it will be a fraud upon him, and will be illegal. (a)

Taking holy
orders for cor-
rupt considera-
tion.

The conferring of holy orders on persons on corrupt considerations, forms properly the offence of simony, and though any corrupt agreement which induces a person to become a candidate for the priesthood scarcely falls within the legal definition thereof, yet it seems so contrary to the proper institution of that sacred office, that a court of law ought not to enforce it. Such was the opinion of Lord Eldon, who thought that an annuity granted by a father to a son until he should be instituted to a living, accompanied with an agreement by the son forthwith to enter into holy orders and accept such living, was illegal, as being against the public policy of the church. (b)

Contracts in
restraint of
trade.

III. Another instance of contracts void as against public policy is, where the freedom of trade is restrained. In a commercial country it is of great importance that all trade should be open and unrestricted to every one. Hence the law will not allow any one, by his contract, to prevent himself *entirely* from exercising his trade, or employing his talents, industry or capital in any useful undertaking in the kingdom. (c) In very early ages the principle was expressed by the courts, and it has been established by a long series of decisions. (d) The grant of an annuity, therefore,

(a) Waldo v. Martin, 4 B. & C. 319; 6 D. & R. 364.

(b) Lord Kirkcudbright v. Lady Kirkcudbright, 8 Ves. 51.

(c) Horner v. Graves, 7 Bing. 735.

(d) 2 Hen. V. p. 5; Broad v. Jolyffe, Cro. J. 596; Mitchel v. Reynolds, 1 P. W. 181.

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in consideration of the grantee's relinquishing any particular trade and binding himself not to exercise it *at all*, is invalid, as being contrary to general policy. But it is fully admitted that a party may sell the business which he possesses at any particular place, or may bind himself not to exercise his trade or carry on his business within certain limits, either of place or time, because this is only a partial restraint, and cannot operate as a serious, if any, injury to trade and commerce. (a) Besides, if the sale of a business is to be authorised at all, the vendor must restrain himself from exercising it so as to render its purchase valuable, which would not be if the vendor could be allowed to recover what he has sold. All that is requisite to render such a partial or particular restraint valid in a court of law is a valuable consideration, otherwise it will be impolitic and oppressive.

IV. The compromise of crimes or the stifling of public prosecution by private individuals, is also contrary to the good policy of the state. Although any person may institute a public inquiry, it is against the interests of the community that that individual should be allowed to defeat either the trial or the punishment of the accused. A distinction has, however, prevailed between felonies and misdemeanors. The former can in no instance be compromised by the prosecutor, but with regard to the latter it has been allowed by the parties to settle or compound them in all cases where the offence is of a private and personal nature, as an assault, a libel, or a fraud, but it is by no means established that a public offence, though only amounting to a misdemeanor, may be compromised for any personal advantage to the prosecutor. Indeed the case of *Collins v. Blantern* (b) seems to prove the contrary, for there it was held illegal to compromise a prosecution for perjury. However in *Elworthy v. Bird* (c) the Vice-Chancellor decreed a specific performance of an agreement for the grant of an annuity in consideration of the grantor's compromising

Compromise of
public crimes.

(a) *Chesman v. Nainby*, 2 Stra. 239; 3 B. P. C. 349. *Homer v. Ashford*, 3 Bing. 322; 11 Mo. 91. See 1 Selw. N. P. 539.

(b) 2 Wils. 241.

(c) 2 S. & S. 372.

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The creation of
colourable qua-
lifications.

a prosecution for an assault upon her, and though it was objected that it was an illegal agreement, he would not admit the objection to be good.

V. Colourable Titles. Here, perhaps, may also be introduced a few remarks on this subject, which does not often come into investigation. The legislature has for wise purposes imposed the necessity of certain qualifications of property before individuals can perform certain functions or fill certain offices. Thus it is required that every member of parliament shall possess real property to a certain amount before he can sit in the House of Commons, so also every elector before he is registered as a voter at a county election, and every justice of the peace before he acts in that capacity. Now it is clearly the intent of the law that there shall be an absolute *bonâ fide* possession and enjoyment of this property, for a mere right depending upon the will of another would, especially in the former instances, be worse than the absence of the qualification. If then a grant be made in order to confer the qualification merely for temporary purposes, and to be dependant upon the grantee's continuance in the enjoyment of the office or exercise of the function, or if there be merely the form of the grant, so that the grantee is only in semblance the owner of the property, and never receives the profits of it, the object of the law will be defeated.

In order most effectually to repress these impolitic transactions, it seems that in a court of law, if the grant have been completely executed, it will be treated as absolute, and enforced: because no party shall be allowed to set up his own illegal and fraudulent intention against the effect of the deed. (a) And the principle appears to be the same in a court of equity; though when the contract is incomplete and has not been fully executed, that court will give no relief to the intended grantee. Thus in *Pitt v. Pitt*, cited by Lord Talbot in *C. T. T. 155*, (b) the Governor Pitt had granted to his younger son an annuity of 300*l.* in order to qualify him for

(a) *Doe v. Roberts*, 2 B. & A. 367; *Roberts v. Roberts, Daniel*, 143; *Brackenbury v. Brackenbury*, 2 J. & W. 391.

(b) And in *Amb. 266*.

member of parliament, and afterwards got the deed and burnt it. It was decreed against the heir at law to make it good.

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In determining whether the agreement has been completely executed, it is stated by Sir Thomas Plumer, M. R. in *Cecil v. Butcher*, (a) that a voluntary deed, made for a purpose that has never been completed and never parted with, is considered in a court of equity as an imperfect instrument. The same learned judge, while Vice Chancellor, had expressed an opinion that if the event contemplated never take place, as if the member who was intended to be qualified do not become a candidate, he ought not to be allowed to enforce the grant. (b) In *Roberts v. Roberts*, (c) C. B. Richards expressed his disapprobation of this distinction, and thought it unimportant whether the deed had been used or not. However the Court of King's Bench, when the same case came before them, in *Doe v. Roberts*, (d) seemed to recognise the distinction, which was still retained by Sir T. Plumer in *Cecil v. Butcher*.

VI. The last instance requiring discussion under this head is in the case of deeds of separation between husband and wife. The general welfare of society and the best interests of the nation are deeply concerned in the happy union of married persons, and hence the law has wisely prohibited all provisions which may either create or facilitate a separation between parties in that state. It is, however, only in modern times that this principle has been fully recognised, as indeed it is one which will not be suggested until the legislature of a country is advanced to a state of great refinement. As long since indeed as Lord Northington's time, where an annuity was granted to a married woman on condition of living apart from her husband, the condition was held void for illegality. (e)

Deeds of
separation be-
tween husband
and wife.

But a practice prevailed of making provisions in marriage settlement, in anticipation of the future separation of the

Deeds providing
for future sepa-
ration invalid.

(a) 2 J. & W. 573.

(b) *Plantamore v. Staples*, Coop. 250. See also Lord Hardwicke's opinion in *Birch v. Blagrove*, Amb. 266.

(c) *Daniel*, 143. (d) 2 B. & A. 367. (e) *Brown v. Peck*, 1 Eden, 141.

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parties, and it was usual to provide an annuity for the wife's maintenance on that event. It was, however, questioned whether such a provision was not contrary to good policy, as it had the effect of rendering separation more easy, and even possibly of suggesting it on occasions of trifling differences.

The objection was urged in a case of *Lord Rodney v. Chambers*, (a) where a covenant had been entered into by a husband to pay an annuity to trustees for his wife's maintenance, in case she separated with their consent. The Court, however, thought that the validity of these deeds had been too long established to be disturbed, though they expressed an opinion against the propriety of originally allowing them. In *Lord St. John v. Lady St. John*, (b) Lord Eldon again took up the objection, and in forcible language pointed out the mischiefs arising from these deeds. He considered them as contrary to all good policy, as violating all legal principles which prohibit a wife from making any contract whatever, and as interfering with the jurisdiction of the ecclesiastical courts. Hence he expressed a strong opinion against their validity, though he was not called upon to decree that they were illegal. Shortly after, the case of *Durant v. Titley* (c) came before Abbott, C. J. and Dallas, C. J. sitting in error from the Court of Exchequer. There a husband and wife, with a third person, who was a trustee, had entered into an agreement that the husband should pay an annuity to the trustee for the wife, if she should live separate and apart from her husband, and should take one of her children to live with her. It was urged that this deed was void, as providing for a future separation at the pleasure of the wife, not depending upon the consent of the trustee, as in *Lord Rodney v. Chambers*, and the husband pleaded that they had lived together for seven years after the deed, and then the wife had left him without his consent. The judgment which had been given for the plaintiff was reversed, but the reasons for the judgment of the court of error were not expressed.

(a) 2 East, 283.

(b) 11 Ves. 526.

(c) 7 Pri. 577.

It was generally thought that this decision had determined the invalidity of these deeds, (a) and in *Jee v. Thurlow*, (b) Lord Tenterden said, "The judges who decided the case of *Titley v. Durant* did not intend to shake any former decision. They thought it different from all the former cases, inasmuch as the deed provided for the future separations of the husband and wife, who at the time of making the deed were living together." In *Lord Rodney v. Chambers*, though there had been differences, and probably the parties were living separate at the time, the deed was executed upon a reconciliation, and the provision was in contemplation of a future separation. There seems to be, therefore, no such great distinction in the circumstances as to warrant the application of a different principle. In *Hindley v. Marquis of Westmeath*, (c) it was admitted, both by the Court and the counsel, that if the deed be prospective, and provide for a future separation, it is void. So far then the law seems now settled upon sound principles.

But where, through immorality, or ill treatment, married persons are unable to live together, and either voluntarily agree to separate, or a separation is decreed by the ecclesiastical court, of course a maintenance becomes necessary for the wife. When the separation is decreed by that Court, a due provision is made according to the discretion of the judge, with reference to the competence of the parties. Very high authorities have thought it would have been advisable that no separation should have been acknowledged by the law, but under a decree of such Court. (d) There is not, however, such a restriction; the parties are allowed to separate without the intervention of any Court, and to make provisions which will enable the separation to be maintained. Hence deeds executed on a present separation, and not providing for the future happening of such an event are valid. (e) In the customary form the husband covenants with trustees to pay them an

Not for immediate and present separation.

(a) 2 Rep. H. & W. p. 278, 1st ed. (d) Lord Eldon in *St. John v. St. John*.
(b) 2 B. & C. 561. (e) *Jee v. Thurlow*, 2 B. & C. 547.
(c) 6 B. & C. 200; 9 D. & R. 351.

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annuity for his wife while separate, and they usually covenant to indemnify him against her debts. Though this latter covenant is not necessary for the validity of the deed. (a)

The covenant, it may be observed, should be for the payment to the trustees for the wife's separate use, and not to the wife herself, because there would be some difficulty in law in enforcing the payment to the wife, and the trustee could not sustain an assignment of a breach for non-payment to himself. (b)

The separation must also be a present separation in fact; for where a deed on the face of it provided for a present separation, but the parties continued to cohabit, and did not intend to separate at the time, it was held to be invalid. (c)

Courts of equity will not execute an agreement to separate.

Where parties have agreed to separate, but have not fully completed the agreement, formerly there was an opinion that a court of equity would effectuate that agreement, though cautiously and with a due discretion, so as not to prevent a reconciliation when such an event might be expected. (d) But in *Legard v. Johnson*, (e) Lord Rosslyn held that a contract between husband and wife simply for separation and separate maintenance, cannot be enforced by decree in a court of equity, but belongs properly and exclusively to the ecclesiastical courts. If there be the intervention of a third person, who undertakes to relieve the husband from liability on the account of the wife, that may be a ground for an application to equity; so also if there be certain property requiring the attention of that Court, which devolves upon the wife after the separation, or if that which is charged with the provision be the subject of a trust, there may be a necessity for its interference.

Any engagement by the husband with a third person who covenants to indemnify him against his wife's debts, will be

(a) *Ros v. Willoughby*, 10 Pri. 1.

(b) *Lana v. Payne*, 6 Taunt. 140.

(c) *Hindley v. Marquis of Westmeath*, 6 B. & C. 200; 9 D. & R. 351.

(d) *Angier v. Angier*, Gib. E. R. 152; Pr. Ch. 496.

(e) 3 Vea. 352.

enforced in equity, though it be in relation to a separation which would not be enforced between the parties. (a)

The provision is valid, then, on the separation and while they are separated, but on reconciliation and cohabitation it ceases, and cannot be again revived. (b) But if one of the parties, as the husband, be desirous of a reconciliation, and offers again to receive his wife, is the deed of continuing validity? In *Guth v. Guth*, (c) a court of equity held that if the wife refused to be reconciled, the provision continued, and compelled the husband to continue his payments. Succeeding judges (d) have expressed their dissent from this decision, and have thought that the provision should not be enforced against the husband. But surely it seems to be harsh and unjust to compel a wife to be restored to the company of a man who has already rendered his house insupportable to her.

A case has occurred in which a question has been raised whether a deed may not be valid which provides for a future separation, that may be caused by the husband's misconduct.

In *Exparte Draycott* (e) a father, after the marriage of his daughter, covenanted to grant an annuity to her in consideration of her husband's agreeing to settle the same sum upon her in case she survived him, and in case she should separate herself from him in consequence of his misconduct during their joint lives, and not to prosecute her in the ecclesiastical court. The father becoming bankrupt, the husband applied to prove the value of the annuity. But the commissioners thinking the consideration void, as being contrary to the policy of the law, inasmuch as it was a provision for future separation, rejected the proof. He petitioned the Vice-Chancellor, and Sir A. Hart thought

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The validity of
the deeds ceases
on reconcilia-
tion.

(a) *Worral v. Jacob*, 3 Mer. 268.

(b) *Lord St. John v. Lady St. John*, 11 Ves. 526; *Bateman v. Countess of Ross*, 1 Dow, P. C. 245.

(c) 3 B. C. C. 614.

(d) *Lord Rosslyn in Legard v. Johnson*, Lord Eldon in *Lord St. John v. Lady St. John*. See also *Head v. Head*, 3 Atk. 295. 547; 1 Ves. S. 18.

(e) 2 G. & J. B. C. 283.

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the commissioners wrong on this point, and that it was a perfectly good and legal covenant. Afterwards Sir L. Shadwell, without deciding this, thought there was a sufficient consideration in the agreement to pay the annuity to the wife in case she survived her husband, and granted the prayer.

For a farther examination of the questions here treated of, so interesting in connubial law, the reader is referred to the elaborate note of Mr. Jacob in his edition of Roper's *Law of Husband and Wife*, vol. ii. App.

Where the consideration is immoral.

Again: the law recognises no contracts which tend to violate private morality. Many of the cases already referred to in some respect have such a tendency in addition to the other objections which have been stated, but there are others which do not readily fall under any of the previous divisions. It is scarcely necessary to refer to the instances usually suggested, where the consideration is the commission of some crime or offence, or the aiding or concealing the offence of another. But a long series of decisions cannot be neglected, which have established that an annuity, granted to induce the grantee to enter into or continue in a state of unlawful concubinage, is void; while an annuity granted in compensation of the loss of chastity already incurred, and after a separation of the parties from their immoral connection, will be supported and enforced.^(a)

It is not necessary that the obligor should have been the seducer, for Lord Hardwicke enforced a bond which had been given to a prostitute,^(b) though in another case^(c) he refused to establish an annuity which the defendant had bound himself to grant to the plaintiff, where the only objection seems to have been that the plaintiff had not been first seduced by him, and probably had not been faithful to

^(a) *March. of Annesdale v. Harris*, 1 E. C. Abr. 87; 3 B. P. C. 445; 2 P. W. 432. *Lady Cox's case*, 3 P. W. 339. *Cray v. Rooks*, C. T. T. 158. *Turner v. Vaughan*, 2 Wils. 339. *Walker v. Perkins*, 3 Burr. 1568; 1 Bla. 517. *Gilham v. Locke*, 9 Ves. 612.

^(b) *Hill v. Spencer*, Amb. 641.

^(c) *Clarke v. Periam*, 2 Atk. 333.

him during their cohabitation, but the case seems to have been ultimately settled by some arrangement.

In a case (a) which also came before the same Lord Chancellor, where a young woman claimed an annuity granted to her by a married man who had seduced her, and with whom she had lived, well knowing of his marriage, the bill against the grantor was dismissed, certainly upon the ground that the adultery was an aggravation, and manifestly tended to destroy the peace of families. But it is now decided that the law will not measure with nice discrimination the different shades of immorality. And therefore though in *Mathews v. L—e*, (b) a married woman having cohabited with a man, the Vice-Chancellor seemed to intimate an opinion that the case differed from that of an unmarried woman who lives with her seducer, yet in *Nye v. Mosely* (c) the Court of King's Bench held expressly that there was no authority for the distinction, and decided that where a woman lived in an adulterous connection with a married man, of whose marriage she was perfectly cognizant, the annuity, which he settled upon her and her child after separation, was legal and valid.

The validity of the grant is not affected by any subsequent matter, and therefore a resumption of the immoral connection after the annuity has been granted, if there have been a real and honest discontinuance of the cohabitation, will not invalidate the security. But as the discontinuance may have been for the purpose of evading the rule of law, it is a question of fact to be determined by a jury whether there had been an honest intention to separate or not. (d) If on the resumption of the connection the obligor maintains his mistress, she will not be allowed in a court of equity to claim the annuity, at least where it appears to have been settled upon her for her maintenance. (e)

(a) *Priest v. Parrot*, 2 Ves. S. 160.

(b) 1 Mad. 558.

(c) 6 B. & C. 133; 9 D. & R. 165. See also *Spicer v. Hayward*, Pr. Ch. 114.

(d) *Friend v. Harrison*, 2 C. & P. 584.

(e) *Loyd v. Carter*, 2 Atk. 85.

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Where there is
an error in the
consideration.

There is no objection to the grantor making it a condition in the grant that the grantee should live single after their separation. (a)

Lastly, if the consideration be effected by mutual error, and the parties be each equally innocent of any fraudulent intent, it may be presumed that the annuity would not be supported. As if, for instance, the annuity were granted on a life supposed to be in existence at the time, whereas, in truth, such life had expired.

(a) Gibson v. Dickins, 3 M. & S. 463.

CHAPTER VI.

OF THE SECURITY.

As an annuity is a contract to be performed at future periods, it is always desirable to obtain some fund upon which a charge may be so laid as that the performance may be duly enforced. Where the consideration is valuable, as money or the relinquishment of a business, the one party executes his part of the contract at once by the payment of the money or retiring from the trade, he is therefore naturally anxious to obtain as full a security as is possible from his co-contractor for the fulfilment of his part. He therefore seeks to bind all the property of the grantor, and according as that property is or is not chargeable or available, the terms on which the annuity is negotiated are higher or lower.

Necessity of
obtaining secu-
rity for the pay-
ment.

Thus he endeavours to obtain a charge on the lands of the grantor, or upon his assignable property, and a power from time to time to attach his personal estate. The charge upon the lands is either by the grant of the rent charge with a power of distress or a power of entry, or it is by the creation of a term of years, or even of a greater estate, which is vested in trust for the benefit of the grantee, the trustee being directed either to enter on default of payment, or to enter forthwith, and pay the annuity out of the rents and profits of the land taken by him, or even to sell and dispose thereof in discharge of the arrears.

Where the grantor has a fund which accrues to him periodically as a stipend or salary, he may charge that in various ways according to its nature, as by creating a trust and directing the trustee to receive the same and pay the annuity out of the receipts, or he may at the first authorise the grantee to receive the payments and satisfy himself.

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Election between the real and personal security in ancient times.

He can bind his personal estate by entering into the obligation of a bond and covenant, which will also operate against his heirs. And he may execute a warrant of attorney to confess a judgment against him, upon which execution may be taken out against his person or goods from time to time as the payments fall into arrear.

In modern times, when the annuity is bought and sold, the grantee generally obtains all these securities, where they are attainable. Anciently a great distinction prevailed between the rent that was charged on the land and the annuity which only attached upon the personalty. The rent was, and indeed still is secured by the land on which it is charged, provided the annual value of the land be equivalent with the amount of the rent, and the grantor's interest therein be coextensive with the term of the grant. In either of these cases, if the grant were originally made and taken as a rent only, it will be valid to the amount of the actual value, or to the extent of the grantor's interest only, and will be inoperative as to the rest. But if the grant in its terms may be treated either as a rent or as an annuity, the grantee may elect, and, on failure of payment, may, according to his own option, proceed against the land or the person of the grantor. This is illustrated by the early case of *Fulwood v. Ward*.^(a) There Queen Elizabeth being seised of an estate for the life of Lord Paget, demised it for twenty-one years to Ward. Ward granted to the plaintiff an annuity out of it for fifteen years, with a clause of distress. Shortly after, Lord Paget died, and the estate determined. Whereupon the plaintiff brought a writ of annuity for the arrears which accrued after his death. It was objected that this was a mere rent charge, which ceased when the estate on which it was charged determined; and of that opinion were three of the justices. But all the rest of the court, which was composed of all the judges, decided that the grantee might hold the grantor personally liable, that the law gave him an election to have

^(a) Pop. 86; 2 And. 1;

it as a rent or an annuity, which he could only lose by some act of his own, and he had done nothing to deprive himself of it in that case.

But it will be right to consider this subject of election more at length. Littleton, in sect. 219, states this: "If a man grant by his deed a rent charge to another, and the rent is behind, the grantee may choose whether he will sue a writ of annuity for this against the grantor, or distrain for the rent behind and the distress detain until he be paid. But he cannot do or have both together. For if he recovers by a writ of annuity, then the land is discharged of the distress. And if he do not sue a writ of annuity, but distrain for the arrearages, and the tenant sueth his replevin, and then the grantee avows the taking of the distress in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity." So it is laid down in Roll Abr. Annuities, F. that if a grantee bring an assise for a rent, he can never treat it afterwards as a personal obligation, and bring an annuity.

Whether the party has made an election or not, is a question of evidence in each particular instance. Though *prima facie* the grant is to be taken as a rent, since that, in legal presumption, is more beneficial for the grantee. (a) Lord Coke, in his commentary on the above passage in Littleton, (b) says that the determination of the election must be by action, or by suit in a court of record, for the taking of a distress, unless there be an avowry, will not bar the writ of annuity. The mere suing out of a writ of annuity, or an assise, will not however be sufficient, unless the grantee appear on the return thereof and count thereon. In one case (c) it was held that the grant of an imparlance to his writ destroyed the election. But where in a writ of annuity the plaintiff stated in his count that he was seised in his *demesne as of freehold*, and it was objected that he thereby expressed his election to take it as a rent, the

Whether the election has been made or not, is a question of fact.

(a) Pop. 87; 2 Buls. 149.

(b) 145, d.

(c) *Jenys v. Applefourth*, Bro. & G. 182.

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Court refused to admit the objection. (a) So also where he stated it to be a rent charge, yet brought an annuity, the Court held the bringing of this action to be an election. (b) The assignment of a rent to a third person, to whom the tenant of the land attorns, is the determination of the election, and the assignee cannot claim it as an annuity. (c)

Election not
 always allowed.

But there are cases where the law does not give the power of election; for if the rent be granted in satisfaction of a real right, as on equality of partition, allowance of dower, or recompense of title, the grantee has no election; the rent remains of the same nature as the thing for which it is granted, and will not become a matter personal. (d)

In a case however, (e) where on partition one coparcener bound himself by bond to pay an annuity during a certain life to the other, in order to make an equality, and the bond was made payable to him, his executors, or administrators, the Lord Keeper held that as this was not the actual grant of a rent, but an agreement which might be executed by the payment of a gross sum, or a rent, it vested in the grantee's executors, and not his heir. So if the granting of the rent work a forfeiture, it is said the grantee shall not, by electing to take it as an annuity, defeat the forfeiture. (f)

Can be pre-
 vented by the
 grantor.

Again: the grantor may expressly prevent the election by a provision in the grant, or even in a separate deed, that it shall not subject the person to an action of annuity, but only charge the lands; because, when the law gives two remedies, the party may exclude the use of one of them. When a rent is granted, the person is chargeable by implication of law, and there is no repugnancy in a restraint upon that personal charge, since sufficient remedy will still remain. And Lord Coke (g) puts the case of a rent granted by two joint tenants, and says it may be provided that the person of one of them shall not be charged,

(a) *Bodwell v. Bodwell*, Cro. C. 171.

(b) *Sprint v. Hicks*, 2 Buls. 148.

(c) *Goldsb.* 83.

(d) *Pop.* 87; *Co. L.* 169, b; *Roll Abr. Annuities*, c. 8.

(e) *Hulbert v. Hart*, 1 Vern. 133.

(f) *Butler & Baker's C.* 3 Co. 29.

(g) *Co. L.* 146, b.

in which case the person of the other only will be chargeable. But a proviso saving the land in a grant of a rent will be void for repugnancy. So where the grant purports to be a charge upon land which the grantor has not, or in which he has only a defeasible title, and is evicted from it, a condition not to charge the person would be void, for that is the only remedy the grantee has, such a grant being in effect an annuity. (a)

The election which exists at one time may be lost or taken away by the event of certain contingencies. As in a case in *Dyer*, 344, b. There one granted a rent charge by deed without mentioning his heirs. On his death it was held by the court that the grantee had no longer an election, but could only proceed against the land. The grantee at first sued out a writ of annuity against the heir, but discontinued the action, and distrained for the arrears. The Court of Common Pleas held that he was justified in so doing, and was not prevented by his former proceeding. "If," said Lord Hobart, (b) after citing this case, "the writ of annuity had been brought against the grantor himself, it would have been bound for ever, and so it would have turned the rent charge in fee simple into an annuity only for the life of the grantor." In his lifetime the grantee would have had an election.

And in general, where the grantee determines one of the remedies, as by release, consolidation, or otherwise, the election ceases, and the grantee cannot even proceed on the other arising from the same instrument, because the law discharges that obligation. (c)

By means of this power of election the grantee of a rent entailed may sometimes defeat the entail; for if tenant in tail of a rent bring a writ of annuity and recover, his issue shall not have a formedon of the rent so recovered, but it shall be as a fee simple conditional. (d) At the same time

By this power an entail in a rent may be defeated, but not a widow's right to dower.

(a) Co. L. 146, a; *Brediman's C. 6. Co. 58*, b; *Perk. Conditions*, sect. 731; 1 *And. 305*; 3 *Buls. 148*. (b) In *Foster v. Jackson*, *Hob. 58*.
(c) *Dyer*, 140, b; *Pop. 86*; 2 *Buls. 149*.
(d) *Pop. 87*; *Perk. Grants*, sect. 79.

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if a rent descend on the death of the grantee upon his heir, and he leave a widow, who claims to be endowed thereof, the heir cannot elect to treat it as annuity, for he cannot determine his election by claim only, but must bring a writ of annuity, before which time the widow's right will have accrued. (a) This was admitted by the court in *Cadee* and *Oliver's* case. (b)

Whether the election can be by any other action than an annuity.

It is observable here, that the personal remedy referred to in all these authorities is a writ of annuity, and it is stated by Mr. Plowden (c) that this is a specific remedy, attended with this specific effect, and that no other action which the grantee may bring for the arrears will operate to the same effect. It is no doubt true, that if there be several securities, one to attach upon the land or the other upon the person at the same time, a proceeding upon one will not affect a subsequent proceeding upon the other. As in the case of a mortgage, where the mortgagee may sue on his covenant for payment of the interest, and may afterwards bring an ejectment for the land. But where there is one only security, namely, the grant of the rent charge, upon which the law allows a remedy against the land and against the person, the doctrine above discussed seems to depend upon this principle, that the grantee may elect one of the two, and shall be bound by that election. There appears nothing to confine the personal remedy to the action by annuity, it seems only to be a question between a personal or a real remedy; and if the grantee choose the former, he is bound by his election, whatever form of action he may have adopted.

Questions on wills, as to what fund is primarily charged.

Hitherto it has been considered that the law authorises the grantee to elect whether he will treat the grant as a charge on the land, or as a personal charge. This option arises on a deed, and even in that it may sometimes be a question of construction, whether one fund only has been charged or both. But in the case of wills and devises the question not unfrequently arises.

(a) Co. L. 144, b.

(b) 3 Les. 154.

(c) *Annuities*, p. 239.

This rule seems to be established, (a) and is further explained by the following cases, that a general charge is a charge upon the personalty primarily, and there must be express words, or an apparent intention to postpone or exclude it, so as to throw it upon the land. In *Fitzgerald v. Field*, (b) a testator by his will directed that with the money arising from his personal estate, bequeathed to trustees, (which was to be first so applied,) and from the sale or mortgage of certain real estates, devised to the same trustees for a term of years, the annuities thereafter given should be paid; and he afterwards bequeathed an annuity secured by powers of distress and entry. By a codicil, he bequeathed his personalty and the residue of his real estate to other trustees, upon the trusts already mentioned, and gave an annuity to A. M. which he charged on the residue of his real estate, and secured by a power of distress. It was held by the Master of the Rolls, that the personalty was primarily liable, and that the real estate was only charged as an auxiliary fund.

Again: in *Cole v. Turner*, (c) a testator gave an annuity and pecuniary legacies, and then devised all the rest, residue and remainder of his freehold, copyhold, and leasehold property, to trustees for the use and benefit of his children. Here the Master of the Rolls held, that the annuity was well charged upon the freehold, copyhold, and leasehold property, though given prior to the devise of the latter.

But where a testator devised a rent charge of 200*l.* by his will, payable half-yearly at stated periods, with a power of entry, and afterwards by a codicil, attested by two witnesses only, reciting that he had bequeathed in his will only 200*l.* a-year, gave "an additional sum of 100*l.* a-year more, payable to him as mentioned in my will," the Lord Chancellor held, that there was no implication that the fund should be the same; and that the words "payable as

(a) *A. G. v. Downing*, Amb. 572; 1 Dick. 417. *Brown v. Claxton*, 3 Sim. 235.

(b) 1 Russ. 416, 422.

(c) 4 Russ. 376.

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mentioned in my will" only described the time, mode, and place of payment. He, therefore, decided that the latter was a personal charge, which decision was confirmed on appeal in the House of Lords. (a)

In a very late case, a testator devised lands to R. in fee, and after reciting that he had executed a bond for the due payment of an annuity, he charged the land so devised, and also the said devisee, his heirs, executors, and administrators, with the payment of the annuity. He then gave divers pecuniary legacies, and bequeathed the residue by his codicil to R. and W. equally. It was decided by the Master of the Rolls, and the Lord Chancellor Lyndhurst on appeal, to be primarily a charge upon the lands devised, and upon R. personally, in exoneration of the personal estate. (b)

So where lands were devised to A. for life, remainder to B. in fee, subject nevertheless to and charged and chargeable with the payment of the yearly rent or sum of 20*l.* to C. D. during her life, payable by A. as long as she should live, and after her decease to be paid by B., it was held that this was a direct charge on the land, and not a personal obligation only, and a distress was held valid. (c)

Where a testator devised his estate to his executor, and desired him to pay an annuity to his heir at law, without expressly charging it thereon, a Court of Equity held the land to be liable. (d)

At common law, it has been seen, the grantee might elect to take the charge as a real or personal charge, and would be bound by his election. Something like this has occurred in a late case, (e) where an annuity was bequeathed so as to be in truth a charge on the testator's personalty, but for many years it was paid by the owner of the real estate, having been treated as a charge thereon, and the legatee not

(a) *Wright v. Lord Cadogan*, 2 Eden, 239; 1 B. P. C. 486, ed. To.

(b) *Welby v. Rockcliffe*, 1 Russ. & M. 571.

(c) *Buttery v. Robinson*, 3 Bing. 392; 11 Mo. 262. See *Caudrey v. Kingsmill*, Noy, 71; *Moore*, 592.

(d) *Elliott v. Hancock*, 2 Vern. 143. (e) *Brown v. Claxton*, 3 Sim. 226.

having claimed it from the executor when a suit was instituted for administration of the personal estate. The possessor of the real estate refusing to pay it, the Vice Chancellor would not allow the parties who had after many years become interested in the personalty to be charged with it.

Some difficulty has also been found in determining the extent of the charge on the lands, or how far the security extends. This is a question of construction, depending upon each particular case, but the following have occurred. One Lady Finch granted to her son, Henry Finch, a rent of 20*l.*, issuing out of her manor of E., among others, by the name of her manors of E., O., P., and S., and of the messuages, lands, tenements, and hereditaments, situate in the parishes of E. W. and C. or elsewhere, in the said county, *to the said manors, or any of them, in any way belonging or appertaining.* She had land in the parish of C. not belonging to any of those manors, and the Court held that the rent was not charged upon this, that the concluding part of the sentence applied to all the previous words. (a)

Some difficulty in determining how far the charge extends on the land.

So where one Rainsford possessed a term of thirty years in a farm called Crewelfield Grange, divided into several parcels, one of which was called Hobbesfield; his executor demised all the Grange except Hobbesfield to Bere, and Hobbesfield he demised to Frecleton, and afterwards granted the residue of the term to Bere and Frecleton jointly. The reversioner, who was entitled to the freehold, granted a rent, issuing out of all his lands called Cr. Grange, *lately in the occupation of Rainsford, and now in the tenure and occupation of Bere.* It was held, that Hobbesfield was not charged, because, though the land might be said to be in the tenure of Bere and Frecleton, yet Hobbesfield was not in the occupation of Bere. (b)

Where two manors were known by the name of Walden, one of smaller value than the other, and a rent was charged

(a) H. Finch's Case, 6 Co. 39; Pratt v. Moon, Yelv. 82.

(b) Ognel's Case, 4 Co. 50.

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on the manor of Walden, without its being specified which, it was held that the more valuable was charged. (a)

The will was, I devise my lands in the parishes of A. and B. to J. S., and I devise a rent to J. N. out of my land *in the parish aforesaid*; Lord Holt held it good to charge the lands in both parishes. (b)

The grantor's title to the land, and his charges thereon, should be carefully examined.

The party who grants a rent should have a sufficient estate in the land to support the charge. If seised in fee, he can undoubtedly make a valid grant, and it is a point for the grantee's own consideration whether the grant exceed the value of the land. It is obvious that the grantee who advances a valuable consideration for the grant of a rent should carefully examine the value of the land charged, and make full inquiries as to whether there be any previous incumbrances, whether mortgages, judgments, or other annuities, which affect the land and diminish its value.

As to a defective title, where a party charges an estate to which he has not a valid title at the time, he will, nevertheless, be estopped by the terms of the instrument by which it was conveyed, though it were a lease and release, from denying the charge, if at any future time he acquires a valid title thereto. (c)

It will be well to consider somewhat in detail the parties who can give a valid security for the grant.

Grant by disseisor and dis-
seisee.

A disseisor may make a charge by way of grant of an annuity to continue until his title shall be defeated, but a disseisee cannot make a valid charge to take effect at law, even after his seisin shall be restored; (d) because no grant of an interest in land is available where the grantor has not the possession or present right to the enjoyment.

By tenant in
tail.

A tenant in tail cannot grant a rent so as to bind his successors, except by way of collateral warranty, or where the estate has been legally benefited thereby, as if an existing charge or claim has been thereby relieved. (e) In

(a) *Harding v. Count.* Suffolk, 1 8vo, Rep. Ch. 138.

(b) *Anon.* 12 Mod. 375.

(c) *Bensley v. Burdon*, 2 S. & S. 519. *Newton v. Weeks*, Aleyn, 79.

(d) 2 Pr. Abs. 400, 404.

(e) Co. L. 343 b. See Chap. VIII.

such cases the succeeding tenant in tail will be bound, if the warranty would have extended to him, or if the rent be a fair and reasonable equivalent for the previous charge. If, however, the tenant in tail afterwards levy a fine or suffer a recovery, the rent which he had granted before will be valid to the full extent granted, because by the original grant he was estopped himself from denying his title to grant so much, and after he has defeated the entail, no one can claim the land but under him and will be equally estopped.

A case in equity (a) may be introduced where a tenant in tail, under a settlement, encouraged one to purchase a rent charge, devised by the settlor to the younger brother of the tenant. The Lord Keeper decreed that he should confirm the rent charge or redeem it. For though the tenant was ignorant of the settlement at the time, yet he ought to have known his own title when he encouraged another to take a charge upon it.

It is a very frequent practice to give persons entitled to a life or other limited interest in land, power to grant rents for specified purposes, as especially under settlements, where the father is authorised thus to provide for younger children. The power given must be strictly conformed to, otherwise the charge will fail; though a fair and reasonable interpretation is put upon the terms of the power. Thus it was held that a power to grant an annuity for the lives of A. B. and C. was considered to be well executed by a grant for three lives and the longer liver. (b)

But where the tenant for life has a power to raise a sum of money by a charge on lands, the grant of an annuity out of such lands cannot in all cases be taken to be a good execution of the power. Yet in one case, which was made up of various peculiar circumstances, an annuity was supported when granted by a tenant for life who had such a power. (c) It has been decided that, under a power to

(a) *Hobbs v. Norton*, 1 Vera. 136; 2 Ch. C. 128.

(b) *Alsop v. Pine*, 3 Keb. 44.

(c) *Marnell v. Blake*, 4 Dow, P. C. 248; 2 Ba. & Be. 35.

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appoint to children for such estate and estates and in such shares and proportions as the parent should think fit, the limitation of a rent charge was a good appointment. But on the other hand it has been held, that a power of appointment for such interests or otherwise as the party should specify, did not authorise a limitation of a rent charge. Sir E. Sugden expresses an opinion that the former case would now be supported. (a)

A power to charge a rent on a part of an estate will not, even in equity, warrant a charge on the whole, because in such cases the intent is clear that the whole shall not be incumbered; and a power to settle part of an estate of given value will not authorise the grant of a rent of the same value on the whole. (b)

A married woman had power to appoint a certain sum of money among her next of kin; by her will she appointed to her nephew, but directed him, in consideration thereof, to pay his mother an annuity for her separate use, and to enter into a bond for its due payment. He died before the testatrix, but though the appointment failed as to him, Lord Hardwicke held that the annuity remained a charge on that fund. (c)

By a termor.

Strictly speaking, a termor, having only an interest in land for a certain term of years, cannot grant a freehold interest thereout; and therefore the grant of a rent for life charged on a term for years would be invalid. But it has been held that this amounts to a grant for the residue of the term, if the annuitant shall so long live, and the land is charged to that extent; (d) in which case the grantee has a chattel interest only, and in the case of a bequest it is a legacy cognizable by the ecclesiastical courts. (e)

Where a man having a freehold interest in certain lands, and also possessed of a term of years in others, grants a

(a) Sugd. Powers, 450.

(b) *Ib.* 453. *Hervey v. Hervey*, 1 Atk. 561.

(c) *Oke v. Heath*, 1 Ves. sen. 135.

(d) *St. Auby's C. Cro. El.* 183; *Plow.* 524; *Co. L.* 147 b; *Butt's C.* 7 Co. 23.

(e) *Ramsey v. Ross*, 1 Sid. 279.

rent out of both for life or in fee, with a power of distress in both lands, the rent is held to issue out of the freehold lands, though the grantee has a power to distrain in the latter as an additional security. (a) In like manner when a grantor charges a rent upon lands of which he is seised in fee, and also upon others of which he is seised in fee tail only, on his death the whole rent shall be charged upon the fee simple lands, and not be apportioned as in the case of rent service. So if the grantor recover one of the acres charged by title paramount, the whole shall be charged on the others. (b)

Such being the legal effects of these grants, care should be taken in pleading them that they be stated accordingly. The rent in the former instance should be stated to be a chattel interest, and the latter to issue out of the freehold. (c)

How such
grants should
be pleaded.

But can a lessee for term of years grant a rent charge out of the lands leased to him? In the mode which is ordinarily adopted, the lessee assigns or underlets his term to a trustee on trust, that he shall continue to occupy so long as he pays the rent, and that on his default the trustee shall enter on the land and take the profits, or shall have power to distrain upon the grantor, who is made a tenant of the trustee. It is said, however, in — v. Cooper, (d) by the court, that a rent charge cannot issue out of a term of years. The note of the case is not very distinct and the report is not given at length, neither is it clear what is actually meant by this. Certainly the cases cited above from Cro. El. 7 Coke and Siderfin, seem to recognise the validity of a grant by a termor, but it does not appear that those were leases on which rents were reserved. There seems to be this objection to the grant,—the lessor has leased his land with the power of distress necessarily incident to his right, can the lessee by his grant diminish that security, which he would do if he could authorise another to distrain for a rent charge, against whom the original lessor could have no remedy for his

(a) Butt's C. 7 Co. 23.

(b) Co. L. 148 b.

(c) Butt's Case.

(d) 2 Wils. 375.

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Rent to issue
out of lands
with power to
distrain in
others.

rent? Formerly, if the rent would have amounted to a rent seck it would have been invalid, because the only remedy for such a rent was an assize, and that would not lie where there was only a chattel interest. (a)

It seems anciently to have been a common practice to grant a rent to issue out of certain lands, with a power of distress over certain other lands also. The rent was not considered as charged upon the latter, but upon those from which it was to issue, while the power of distress over the others was in the nature of a penalty to secure the due payment. Hence, if the former lands were evicted, the whole rent was extinguished, though the latter remained, but it was not affected by the eviction of the latter. (b) So, if the grantee purchase part of the latter lands, the rent is not extinguished, whereas it is lost if he purchase part of the former.

In construction of the grant, it was held indeed that a grant to distrain in the manor of S. for a rent of 40s. was a grant of a rent charge out of S. (c) But if a rent were granted to issue out of the manor of D. with a power to distrain for it in the manor of S. also, it was only a rent charge in D. In the former case, if it were not held to be the grant of a rent, it would not amount to any thing, which difficulty did not arise in the latter. (d)

As to copyhold
lands.

In regard to copyholds, it is laid down by Lord Coke, that rents cannot be granted by copy, because they are not in tenure, and cannot be holden. (e) In Gilbert on Tenures, p. 331, it is stated that rent charges may be so granted, and afterwards, in the same page, it is said they cannot, unless appendant to some other thing. But the better opinion is that they cannot be so holden, as also they cannot be surrendered. Although, however, a rent created out of a copyhold may not be alienable at law, by the surrender of the grantee and admittance of the assignee, yet it is a title which will be supported in equity, if the assignment be

(a) Bac. Abr. Rents, G. p. 347.

(d) Co. L. 147.

(b) Co. L. 147.

(e) Co. Cop. s. 42. Supp. s. 17.

(c) Dyer, 23. a.

made for a valuable consideration, and the tenant of the copyhold will be compelled to pay the rent. (a)

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When the tenant of a copyhold wishes to charge his copyhold as a security for an annuity, his proper course is to surrender the premises to the grantee or a trustee, upon condition that if the annuity be paid, then the surrender shall be void; but if default be made in the payment thereof, then the surrenderee shall hold the premises, in trust to pay the annuity out of the rents and profits, and the surplus to the surrenderor. In ordinary practice the surrender is not actually made, to avoid the expense of the fees and stamps on admissions, but the grantee remains satisfied with the covenant. If the arrears at any time reach the value of the copyhold, it will be then proper to enforce the surrender.

As to the lord of a manor, he cannot of course charge the lands in the possession of a copyholder with a rent. But there is a question which is not altogether settled, whether a charge made by the lord will attach upon a copyhold, which afterwards comes into his hands, and is then re-granted out by him. In Walton's C. in Dyer, 270. b., this distinction is taken. "If the lord grants a rent to B. out of the manor, and afterwards grants an escheated copyhold to A., the latter comes in subject to the charge. But it is otherwise, perhaps, if an ancient copyholder had surrendered to A., and the lord had only admitted him accordingly." The same distinction is cited in 1 Leon. 4. But in Sammer and Force (b) it was decided by the Court of King's Bench, that the lord's grant will not attach upon an escheated copyholder, which he grants out again, because the copyholder comes in above the grant, namely, by the custom. And it is stated there that in Swain v. Becket, the case in Dyer had been overruled. Certainly in Swayne's case, reported in 10 Coke's Rep. p. 63, it is said to have been adjudged that the lord's widow shall not claim dower out of the new copyhold, and so the copyholder

Charge by the
lord of the
manor.

(a) Spindler v. Wilford, 2 Vern. 16.

(b) 2 Br. & G. 208.

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who comes in by voluntary grant shall not be subject to the charges or incumbrances of the lord before the grant, which was affirmed to be good law. And in the report of the same case, in Moore (*a*) it is said, "So of a rent granted out of a manor, a copyholder who comes in by grant after the grant of the rent, shall not be charged with the rent." Popham, A. G., in argument of the case referred to in Coke's Reports, (*b*) says, "If the lord of a manor, after his marriage, grant a rent out of customary land, and afterwards grants the same land to a copyholder for life, his widow shall have her dowry discharged of the rent, but the copyholder shall be charged." And, indeed, in the case of Sammers and Force, Lord Coke seemed to think that, if a rent be granted out of certain specified land, and that be granted out again, after an escheat, that then it should be charged, because it was so expressly. Lord C. B. Gilbert (*c*) says, that in some cases the rent may be charged upon the copyhold so granted out after escheat, and he distinguishes between a rent and other incumbrances, as dower or a statute, because the former operates forthwith, whereas the latter may not be an actual charge at all, or, at least, not till the fresh grant has been made. But Watkins, in his note on the passages, contends, that the lord's grant of the rent cannot operate as a charge upon a copyhold voluntarily granted by the lord. Reference is made by him to a case in 2 Leon. 109. 152. and 3 Leon. 59, but it seems to turn entirely upon the statute 32 Hen. VIII. c. 37, and will be considered hereafter. The result of the inquiry seems to lead to the conclusion that the land will not be charged in the possession of the new copyholder. (*d*)

Rent cannot be charged on incorporeal interests.

A rent cannot be charged upon any merely incorporeal rights not subject to a distress, or which in early times could not have been viewed in an assize. Hence a rent cannot be charged on a rent, as already observed, nor on a piscary, common, or any similar franchise, though an as-

(*a*) Swayne v. Becket, p. 811.

(*c*) Ten. 202.

(*b*) Cham. & Dove's C. 1 Leon. 16.

(*d*) See 1 Watk. Cop. 45.

signment of such property may no doubt be made so as to secure an annuity, or the deed itself may be available as a grant of an annuity. (a)

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When a rent is granted, it is customary for the grantor to create a term of years, and vest it in trustees, to secure the payment thereof. In law this will raise a disability on the part of the grantor to constitute any other charge upon the land while the term continues in force, because, legally, he ceases to be in possession. (b) Hence the grantee of a subsequent annuity will have no right to distrain on the land, which is protected by the term. But it has been decided on a writ of error in the Exchequer Chamber, (c) that, as at common law the mere grant of a term does not pass the possession of the land, without an entry, such creation of a term would not of itself defeat the distress of a subsequent grantee of a rent. In the case before them, however, the deed creating the term contained the words *bargain and sale*, as well as *demise*, and it was urged that it might operate as a conveyance under the statute of uses, in which case no entry was requisite. But the Court held that that was at the election of the grantee, and until he elected to take it as a bargain and sale, it must be considered as a common law conveyance; and there not having been an election, it did not prevent the distress. A question was afterwards raised whether, if the election be made, its effect would relate to the original creation of the term, or would only operate from the time when made, but the case was compromised. (d)

Where two
rents are granted
out of the same
property.

It is clear that this is a most important decision, as it removes one of the remedies which a grantee of a rent may have at law, namely, the distress, since the existence of a term previously granted will prevent the power of resorting to it. At the same time, a difficulty is also imposed upon the termor, as evidently an actual entry will in many cases

(a) Co. L. 47 a. 144 a.

(b) *Myles v. Willoughby*, Cro. E. 547.

(c) *Miller v. Green*, 8 Bing. 92; 2 Cr. & J. 142.

(d) *Ex relations*.

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Personal security for an annuity.

be very inconvenient, and in numerous instances now existing has not been made.

Such remarks having been made upon the real security for the rent, it is fit to turn to the personal security. The first in point of legal estimation is the covenant by which the grantor binds his person, and therefore his personal effects, to the due payment of the annuity. This obligation may be in the express form of a covenant, or contained in the condition to a bond, or in the defeasance to a warrant of attorney, as already mentioned. But the writ of execution, which might be sued out on any judgment, to be recovered on any of these instruments, would not touch a species of property which is frequently possessed by persons who find it convenient to adopt this contract. Thus a party may be possessed of a life interest in the dividends of stock in the funds, or canal, or similar shares, or be entitled to receive, in the shape of salary or pension, annual payments, which will be a good security for the due discharge of the annuity, yet on the mere writ of execution none of this property would be available for the grantee. The latter is therefore always desirous to have that property so settled as to form a substantial security for him. In general this may be done according to the grantor's interest therein, the conditions attendant upon his estate, and the circumstances which belong to the grant of the annuity itself. Either the fund is assigned to the grantee himself, with power to take the payments and discharge his own demand thereout, paying over the residue to the grantor, or the trustee who has to pay the same to the grantor is directed to pay so much as the annuity may amount to over to the grantee. Such assignments, if not available in law, will however be enforced in equity. But the various interests of individuals in property are so diversified that it is impossible to point out the mode by which the best security may be made; in each particular case some peculiar form will be requisite, which must be settled by the parties at the time.

Some property
not chargeable.

Yet there are some exceptions to the general power

which individuals possess of charging their property, and they occur in cases where the property is of a public nature, and is granted to the owner to enable him to perform certain public duties. This for the most part applies in ecclesiastical property, and the salaries and pensions paid to persons filling public offices.

In regard to spiritual persons, their duties are for the general benefit of the public, and their employments are directed to the maintenance and government of the church, or the instruction and spiritual guidance of their fellow subjects; nor can they, consistently with the due discharge of those duties, apply their attention to the acquirement of temporal property. To enable the ministers of the church to perform their functions with dignity, decorum, and decency, according to the rank and station which each individual fills, certain endowments and possessions, the principal of which are the tithes, have been appropriated to them, and the law supports that provision. But at the same time that it does this, it restrains its alienation or interception, and will not allow it to be diverted from its intended object. Hence a bishop cannot diminish the revenues of his see by the grant of rents thereout, neither can any clergyman charge his benefice so as to assign the accruing profits. It has been thought that this principle was a part of the common law. Mr. Plowden, in his treatise, (a) has advanced that position, and defended it with learning and energy. In a case of *Mouys v. Leake* it was urged very strenuously upon the attention of the King's Bench, but that court did not find it necessary to determine the point, and it has not been argued in subsequent cases.

The property of
the clergy.

But though the common law be silent on this subject, the legislature has not been so, and several statutes have been enacted which have restrained these charges. By the stat. 1 Eliz. c. 19. s. 5, archbishops and bishops are prevented from charging their episcopal possessions, except

Charges by
archbishops and
bishops invalid.

(a) P. 297.

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by leases, as therein provided. They cannot therefore grant a rent to issue thereout. At the same time such grant is not voidable by the bishop himself, it is only void against his successor. (a) But there is an implied exception of grants to the possessors of ancient offices necessary for the maintenance of the see. (b) A grant to one for professional advice rendered and to be rendered, was holden not to be justified, though it was confirmed by the Dean and Chapter, and the grantee averred that the grantor's predecessors had granted reasonable fees, but did not allege that this fee had ever been granted before. Neither was the grant of a rent to two who filled the office of steward of the manors of the bishopric valid, it being shown that that office had never been granted to two persons before. (c) And though a bishop may grant a necessary and ancient office with a fee attached to it, yet if any additional charge be created beyond what is requisite or customary, that will not be enforced against the successors, though the original grant will still remain valid. (d)

Prohibitions on
collegiate corpo-
rations.

By stat. 13 Eliz. c. 10. s. 3, ecclesiastical and collegiate corporations are restrained from granting rents so as to charge their property. Hence the grant of an annuity by the Dean and Chapter of Rochester to one with an office, was held void, it falling within the prohibition of this act; for though it was alleged to be an ancient office, it was not said that the annuity was ancient. (e)

On the paro-
chial clergy.

But a more extensive statute, as it has proved, was the 13 Eliz. c. 20, which applies to the parochial clergy. It appears that formerly a parson might grant a rent charge out of his living, if the patron and ordinary consented and confirmed it, which would be valid even against his successor, even though it should not commence until after the grantor's death. (f) Hence the prevalence of pensions

(a) B. of Salisbury's C. 10 Co. 61, b.

(b) Bolton's C. and Dr. Dale's C. Ib. ; Dyer, 370, b.

(c) B. of Salisbury's Case.

(d) B. of Chichester v. Freeland, Bridg. 29.

(e) Humphreys v. Powell, 1 Brownl. 182.

(f) Litt. sect. 528, 648 ; Dyer, 69, a.

which still exist in some places, and were originally rents charged upon benefices. It is manifest that this was a most injurious practice, and lead to great frauds upon the revenues of the church. Accordingly that statute was passed in the words of the preamble, "That the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses." After enacting certain regulations regarding leases of parsons who do not reside on their cure, it continued to enact that "All chargings of such benefices with cure hereafter with any pension or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon the leases hereafter to be made according to the meaning of this act, shall be utterly void." This was only temporary, and was renewed by the 14 Eliz. c. 11. s. 11. By the fifteenth section of which, after reciting "that sundry evil disposed persons have defrauded the true meaning of the said statute by bonds and covenants of suffering other persons to enjoy ecclesiastical livings and the fruits thereof, for that such bonds and covenants are not in law taken to be leases, although indeed they amount to such," it is enacted "that all bonds, contracts, promises, and covenants hereafter to be made for suffering or permitting any person to enjoy any benefice or ecclesiastical promotion with cure, or to take the profits or fruits thereof, other than such bonds and covenants as shall be made for assurance of any lease heretofore made, shall be to all intents and purposes adjudged of such force and validity, and not otherwise, as leases by the same persons made of such benefices and ecclesiastical promotions with cure." That is, they are to be void by the parson's nonresidence.

This statute was continued by the 39 Eliz. c. 18, and again by 43 Eliz. c. 9, with this addition, "that all judgments hereafter to be had for the intent to have or enjoy any lease, contrary to the said statutes or any of them, shall be deemed void, in such sort as bonds and covenants are appointed to be void which are made for that purpose." The act was continued by 1 James I. c. 25, and 21 James I.

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c. 28, and by 3 Cha. I. c. 4, was made perpetual. By the 43 Geo. III. c. 84, all these acts were wholly repealed, whereby the power which the beneficed clergyman had at common law of charging his benefice revived. By the 57 Geo. III. c. 99, s. 1, this statute was totally repealed, and so much of the previous statutes as related to leases of benefices and livings and the residence of spiritual persons on their benefices was also repealed. But this was not a total repeal of those statutes, and so much as related to the chargings of benefices was therefore revived. During the interval between the 7th of July, 1803, the date of the 43 Geo. III. c. 84, and the 10th of July, 1817, that of the 57 Geo. III. c. 9, annuities charged by clergymen on their livings are valid. (a) In a late case an annuity was granted during that period, and was charged upon a benefice which was demised to the grantee by way of security. After the 57 Geo. III. c. 99, the grantor borrowed a sum of money and redeemed the annuity, but directed the original demise so created by him to be assigned to the party advancing that money and also other sums, as a security for the whole. It was held that this assignment was but a continuance of the original charge, the only change being the reduction of the annuity to common interest, and therefore as that was created before the 57 Geo. III. c. 99, it was a valid security. (b) Two other points were raised in this case, the first, whether the statute 13 Eliz. c. 20, were not entirely repealed by the 57 Geo. III. c. 99, and the other was whether the rector himself could avoid the charge. No judgment was given by the Court of King's Bench, where it was argued, upon either, though a strong opinion was intimated on the first, that it was not repealed as far as related to chargings. However, in a case which has since come before that court from the Lord Chancellor, it was certified by the judges that the statute of Elizabeth is not repealed but in force as to this point. (c) It was also their

(a) Doe d. Cates v. Somerville, 6 B. & C. 126; 9 D. & R. 100.

(b) Doe d. Broughton v. Gully, 9 B. & C. 344; 4 M. & R. 249.

(c) Shaw v. Pritchard, 10 B. & C. 241; 5 M. & R. 180.

opinion that the incumbent could himself avoid this charge, and that the provision was not made for the benefit of the successor only. Indeed as there was no authority at the common law which justified a parson with charging his benefice beyond his own life, unless the patron and ordinary confirmed it, there seems but little necessity for the enactment if the incumbent cannot himself avoid the grant.

An opinion prevailed among some conveyancers (a) that an annuity might be secured upon a church living, by means of a lease to be granted by the rector at a nominal reserved rent to the grantee or his trustee, and that this being a lease which would have fallen within the first prohibition in the statute of Elizabeth now repealed, it cannot be avoided. However, in the above case of *Shaw v. Pritchard*, the Court of King's Bench have determined that such a lease is in substance a charge, and falls within the existing prohibition of the statute. At the same time it should be noticed that the Court of Exchequer had expressed a different opinion upon this same charge. (b)

It will be observed that the statute does not create any incapacity in the clergyman to grant, it only forbids his charging his benefice with it. Hence he may charge his person or any other property which he may possess, and indeed through his personal obligation he may charge his living. For if a judgment be recovered against him either on his covenant or bond, or on a warrant of attorney, the usual writs of execution may be taken out against him, and among these is the process of sequestration, which issues against his living. This was determined in *Mouys v. Leake*. (c) There a clergyman granted a rent, and charged it on his living by a bargain and sale of his rectory and glebe lands for a term of years. He also covenanted in the same deed to pay the annuity, and executed a warrant of attorney to enter up judgment against him as a collateral security for the annuity. Execution was taken out upon this judgment, and a writ of *Fieri Facias de Bonis Eccle-*

The clergyman
may bind him-
self personally.

(a) 2 Bythew. Prec. 278.

(b) *Bowyer v. Pritchard*, 11 Pri. 103.

(c) 8 T. R. 411.

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siasticis issued against the grantor. A motion was made to set aside this execution, on the ground that the living could not be charged with the rent directly, and therefore the warrant of attorney, which was a security for the payment thereof, could not be supported. But the Court of King's Bench held that the personal obligations were distinct from the charge on the living, and might be enforced against the grantor, the consequence of which was that the ordinary writs of execution which issue against clergymen might be had in this case, and they refused to disturb the execution. This judgment has been supported by the House of Lords in a late case. By 10 Cha. I. c. 2 and 3, similar enactments are made for Ireland as are contained in the above statutes of Queen Elizabeth regarding England. A clergyman in Ireland granted an annuity and charged it on his living there; he also jointly and severally, with his brother as his surety, executed a bond for securing the payment of the annuity. It was held, that though the charge on the living was invalid, the surety was liable on this bond; notwithstanding it was urged for him that the bond was an assurance of the charge on the living, and therefore void, or at least that it ought not to be valid against the surety, who had looked to the charge as valid which had failed. (a)

The living must
not be charged
indirectly.

But the court will not allow a judgment to be given so as indirectly to be a *continuing charge* upon a living as a security for the annuity. If a clergyman execute a covenant and be sued thereon, judgment will be recovered against him for the arrears then due, and to that extent only will the execution issue. If he give a bond, judgment will be signed indeed for the whole penalty, but the plaintiff must assign breaches, and he can only have execution for the arrears. But a warrant of attorney may contain any terms which the parties choose to insert; and, accordingly, it has been suggested (b) that the warrant of attorney might authorise the grantee to issue sequestration against the living on default of payment, and thus a charge might be

(a) Wynne v. Robinson, 4 Bli. P. C. 27.

(b) 2 Ryth. Prec. 274.

created thereon. It may be mentioned, however, that the statute, 43 Eliz. c. 9, which revives the statute of 13 Eliz. c. 20; expressly prohibits the granting of judgments to secure leases granted contrary to that statute, though it may admit of some question whether it applies to the part of the act which prohibits charging. Be that as it may, the courts exercise a general controul over these instruments, and will not allow the provisions of an act of parliament to be evaded by them. Hence several cases have occurred upon this security, the result of which is, that if it appear to the court that the sequestration is to issue, and be a continuing charge to secure the whole annuity, the warrant of attorney will be set aside. But if there be merely authority to issue a sequestration from time to time as default is made in the payment, to cease when the arrears are satisfied, the grantee then stands in the same situation as any other creditor, and the court will not interfere with his process.

In *Flight v. Salter* (a) the warrant of attorney recited the grant of an annuity, which was secured on the defendant's rectory, and a covenant that the plaintiff might immediately on the execution of the deed procure a sequestration of the living, and continue it during the continuance of the annuity, for the purpose of more effectually securing the same. It then authorised the judgment to be entered up to secure the annuity at the time and in the manner aforesaid, and to the end and intent that a sequestration might be obtained or procured and continued by the grantee, pursuant to the covenant. The Court of King's Bench held that it was apparent on the face of the instrument that a continuing charge was to be created on the living. Mr. J. Littledale said, "A judgment given bonâ fide without any intention to evade the statute, might, on failure of other property, have been available against the living, but this warrant of attorney having been given to the intent that a sequestration might issue, would, if it were held good, have the effect of contravening the statute." It was therefore set aside.

(a) 1 B. & Ad. 672.

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In *Kirlew v. Butts*, (a) it did not appear expressly on the face of the instrument that it was to be a continuing charge. But the warrant of attorney authorised judgment to be entered for a certain sum, and if default were made in payment of the annuity for fourteen days, execution was to be taken out against the defendant's estate for the whole sum, and accordingly his living had been sequestered for that whole amount, whereby, in truth, the living became charged with the annuity. The Court, however, after deliberation, set aside the sequestration beyond the amount of the arrears due when it issued.

But in *Gibbons v. Hooper*, (b) the rector had, by an indenture, charged his living with the payment of three annuities, and had given three warrants of attorney, with defeasances in a common form, containing nothing to show that a continuing charge was to be created thereby. The Court held, that as a clergyman cannot be restrained from executing a warrant of attorney in any other case, there was nothing to impeach the transaction in this, and therefore refused to set aside a sequestration which had issued for the arrears due.

However, in the case of *Moore v. Ramsden*, (c) where the deed recited an agreement that a warrant of attorney should be given to authorise a judgment as a collateral security, and the warrant of attorney empowered sequestration to issue from time to time as arrears fell due; the Court distinguished the case from *Flight v. Salter*, because there the sequestration was to give continual possession, whereas here it was only for the satisfaction of the arrears, and they refused to cancel the warrant of attorney, but confined the sequestration to the arrears due when it issued, as in *Kirlew v. Butts*.

In the last case, (d) however, where the warrant of attorney authorised a sequestration on default of payment, but it does not appear from the report whether it was to be for the arrears due or for the whole penalty, the Court of Com-

(a) 2 B. & Ad. 736.

(b) *Ib.* 734.

(c) Hil. T. 2 Will. IV. MS.

(d) *Newland v. Watkin*, 9 Bing. 113.

mon Pleas set aside the entire sequestration in favour of another execution creditor.

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In one respect there is a material distinction between the grant of a rent, which shall be a charge on a benefice, and the sequestration under the process of the Court. By the power of charging his benefice the grantor might assign away all the revenue thereof, whereas the bishop, to whom the writ of sequestration issues, always reserves out of the profits levied under it a sufficient stipend to pay the curate who attends to the duty of the cure. And thus, in *Errington v. Dr. Howard*, (a) the defendant being entitled to a stipend in lieu of tithes under an act of Parliament, assigned it to the plaintiff to secure an annuity. The annuity fell into arrear, the defendant became indebted to other persons, who obtained sequestrations of the stipend, and the plaintiff filed a bill to have precedence of them, which was granted to him, without prejudice to a sum of 50*l.* a year allowed by the ordinary for performing the cure. No objection was raised to the validity of the assignment, and, indeed, in many cases which occurred before the case of *Mouys v. Leake* the restraint on the clergyman from charging his living was not regarded.

The Court of Common Pleas have authorised third persons, as, for instance, another creditor of the clergyman, to apply to set aside the sequestration, and have not confined it to the clergyman himself. (b)

Again: the stipends, salaries, or revenues derived by public officers from their public situations cannot generally be the subject of a security for the grant. Such a security could only be created by the assignment of those revenues, and this assignment, as previously shown, (c) cannot consistently with principles of general policy be permitted. Public offices of trust and confidence could not be assigned from the earliest times, and the same prohibition is continued in modern days. It is almost a necessary conse-

The stipends of public officers are not chargeable.

(a) Amb. 485. (b) *Newland v. Watkin*, 9 Bing. 113. (c) Page 34.

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quence that the holder of the office should not be allowed to deprive himself of that subsistence which the public provide for him to secure his decorous and upright conduct in the office.

Thus it has been held, that the offices of filacer, (a) of clerk to a city company, (b) of provost marshalman, (c) of assistant parliamentary counsel to the Treasury, (d) of serjeant at mace in the city of London, (e) are not assignable.

On the other hand, the office of registrar of policies of insurance in London, (f) of under-marshal of the city of London, (g) have been held assignable.

Whether the office of clerk to one of the six clerks of Chancery be assignable or not is left undecided in a case in 2 Wilson. (h) But in 1 Atk. p. 212, the case of one of the sworn clerks in the six clerks was cited; whose place it had been held was not saleable.

According to the principle, that where the public office cannot be assigned, so also the profits arising therefrom are equally restrained, it was determined by the Court of Common Pleas, on a case sent by the Vice Chancellor for their opinion, (i) that an assignment by a clerk of the peace of all the emolument and profits which should become due to him as clerk of the peace, or in respect of his office, after deducting the salary or allowance of his deputy for the time being, to trustees upon certain trusts, was invalid.

The prohibition
does not apply
to private
offices.

It is, however, only the profits of public offices which are not assignable; for though offices of private trust may not be assigned, yet there seems to be no restraint upon the party's assigning or charging his salary or profits. Thus, in *Harrington v. Klopogge*, (k) it was held by Lord

(a) *Dyer*, 7, b. (b) *Anon.* cit. 2 Wils. 228. (c) *North v. Calf.* ib.

(d) *Cooper v. Reilly*, 2 Sim. 560; 1 Russ. & M. 560.

(e) *Lawfield's Case*, cit. 1 Atk. 212.

(f) *Veall v. Prior*, Hard. 351.

(g) *Ex parte Butler and Purnell*, 1 Atk. 210.

(h) *Goldsmith v. Baynard*, p. 228.

(i) *Palmer v. Bate*, 2 Br. & B. 673; 6 Mo. 28.

(k) 2 Chitty R. 475; 4 Doug. 5; 2 Br. & B. 678, n.; 6 Mo. 39; n.

Mansfield, that the profits arising from the place of private secretary to Lord Holderness were chargeable by way of assignment to secure the grant of an annuity. And the last case is *Aston v. Gwinnell*, (a) in which the grantor of an annuity charged his place or office of clerk assistant to the deputy registrar of the Prerogative Court of Canterbury, held during the pleasure of the principal registrar. The profits of the office arose from the fees and monies payable in respect of the instruments directed to be issued by the Prerogative Court as probates, and from a portion of the discount on the stamps thereon allowed by the Commissioners of Stamps. It was objected that this was void by the statute 5 & 6 Edw. VI. c. 16, or because it was the assignment by a public officer of his salary. The first objection has been already noticed. (b) To the second, the Chief Baron Alexander gave the following answer: "Another class of cases has been with more plausibility applied to this controversy. I allude to that class which is founded on principles of state policy, and which protects the servants of the public from their own improvidence, and secures to them, in defiance of their own acts, the possession of those resources derived from the public, and intended to enable them to perform their public functions. The pay of naval and military officers, and the incapacity to assign it, either at law or equity, after some hesitation at last established, affords the most distinct and intelligible instance of the application of this rule. The office, or rather the profits of the office, of clerk of the peace, seems another instance of the same character. But I am not able to apply that principle to the situation of the defendant. His situation is called an office, but its nature is not very distinctly explained. This, however, is represented, that he is a mere clerk assisting the deputy registrars, receiving emoluments for business done at the pleasure of his superiors. It does not appear to me that he can be considered as an officer of the Court. And as to his connection with the actual execution of any function in the Prerogative

(a) 3 Y. & J. 136.

(b) P. 193.

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Court there is none. It is confined to receiving during the pleasure of his superiors, certain sums earned by the labours of another person permitted actually to perform these functions. I cannot sustain this objection to the relief prayed;" and he held the charge valid.

Lord Coke says, (a) that if a man have an office for life, which requires skill and confidence, to which office a house belongs, and charge the house with a rent during his life, the rent shall not be avoided though he commit a forfeiture.

Public offices
anciently
granted in fee
may be as-
signed.

An exception must be made for public offices, which have been anciently granted in fee; it seems that these are assignable and grantable over. (b) But it may, perhaps, be doubted whether the holder of the office can diminish his revenues by assigning any part of them to another. The office of Registrar of the Court of Chancery was granted by the Crown to the Duke of St. Alban's and his heirs for three lives, which had been renewed from time to time. The profits of the office had been assigned by a former Duke to secure the payment of a mortgage, and Lord Eldon, without determining the actual validity of the transaction, held it to be good against the present Duke. (c)

Husband's
charge on his
wife's property.

Before the consideration of the fund which is chargeable so as to secure the grant be wholly dismissed, it will be right to refer to the property of married women. It has already been shown (d) to what extent the wife can herself charge her property, and how far she is incapacitated, and it has been stated that a wife's realty may be effectually charged by her husband, if she levy a fine. Even against him, though she do not levy a fine, the grant will be valid while he receives the rents and profits, although she will be able to avoid it on his death. (e) As to her personal property, whatever she has at the time of her marriage, or comes to her during her coverture, unless settled upon her

(a) Co. Lit. 234, a.

(b) Com. D. Officer, C. a.

(c) Colman v. D. of St Alban's, 3 Ves. 25; Drummond v. D. of St. Alban's, 5 Ves. 433.

(d) Page 43.

(e) Co. L. 184. b.

separately, vests in him, and may be charged by him. But it must vest in his possession, for where it amounts to a chose in action, he cannot charge it as his own before he has reduced it into his own possession. And it has been settled by the cases of *Hornsby v. Lee*,^(a) and *Purdew v. Jackson*,^(b) that a husband cannot charge his wife's reversionary or contingent interest in property, so as to defeat her right of survivorship, even though she be party to the charge. In the former, the husband and wife assigned certain stock, to which she was entitled after the death of her mother, to secure an annuity granted by him. The mother died, and the husband after her, without having done any act to reduce the fund into possession. The Vice Chancellor, Sir Thomas Plumer, held that the widow was entitled to the stock against the grantee. This decision was new, and was much canvassed, but the same judge, when he afterwards became Master of the Rolls, reviewed it, together with all the authorities on the subject, in the subsequent case of *Purdew v. Jackson*, and in a most elaborate judgment established the principle above laid down.

With regard to the grantor's own reversionary property, the reader is recommended to consider what has been already stated on this subject in the chapter on the Consideration.

As so many contingencies attach upon various species of property, it is of serious consequence to the grantee, who advances his money in the purchase of a rent or annuity, most carefully to scrutinize the title of the grantor to the property, which he proposes to charge, and to examine whether it be chargeable or not. It is not to be supposed that the above observations can point out all the objections that may be raised to the various kinds of property which may be intended to be charged; they may, however, have the effect of preventing a grantee from precipitately engaging in a contract, where he risks so much, without taking good advice as to the validity of the security. Some few points with reference to the security still remain for consideration.

(a) 2 Madd. 16.

(b) 1 Russ. 1.

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The security is
subject to the
equities and
incumbrances
affecting it.

The grantee must take his security subject to all previous incumbrances, and where any chose in action is assigned, as the assignee can only enforce it in equity, he takes it subject to all the equities to which the assignor was liable. Therefore, where one was entitled to certain dividends, payable by the trustees of his marriage settlement, but was also bound to pay them a certain sum, to invest under the trusts contained therein, and having neglected to do so, assigned the dividends to secure an annuity, it was held that the trustees might at any time stop the dividends until the sum was paid over, even though not having notice of the assignment, they had for a considerable time paid them over to the assignor. (a)

It has been held, in regard to incumbrances, that a judgment, being a lien on the land, has priority to the subsequent grant of an annuity charged thereon. (b) But the incumbrances or equities must have duly attached upon the security, otherwise the grantee will not be affected by them. As where the purchase money of an estate was paid over to the vendor's trustees, and by them invested in South Sea annuities. The vendor then granted an annuity for his life, and for security gave a power of attorney to the grantee to take the dividends. The vendee was evicted, and claimed a lien on these annuities, as being the produce of his purchase-money. It was proved that the grantee knew that it was the purchase-money of an estate, but no more. The Lords Commissioners held, that having obtained the possession of this security, before the vendee had been evicted, and therefore before his lien attached, the grantee was entitled to hold it, and Lord Rosslyn confirmed their judgment on a re-hearing. (c) The grantee of an annuity charged on lands has, however, no right to claim the possession of the title deeds, whether the rent has been expressly created, or is reserved on the settlement of the land in the deed of settlement; and is therefore not post-

(a) *Priddy v. Rose*, 3 Mer. 93.

(b) *Davison v. Goddard*, 2 E. C. A. 256.

(c) *Cator v. E. of Pembroke*, 1 B. C. C. 301; 2 B. C. C. 282.

poned to a party who has subsequently advanced money on the estate in ignorance of the annuity. (a) Though a subsequent mortgagee, without notice of the rent, may buy up the title of a precedent mortgagee, and thus gain priority. (b) A sequestration being for a personal offence, namely, the party's contempt, is concluded by his death. Therefore, a rent charge on his lands, which is impeded by the sequestration, becomes in force on his death, when the process is extinct. (c)

A grantor has no power, without the assent of the grantee, to diminish the extent of the security charged with the annuity. And, therefore, where a tenant for life of certain dividends, with a power to appoint, in his lifetime, a part of this fund for the advancement of his children, assigned the whole fund to secure the due payment of an annuity, it was determined that he could not afterwards diminish this fund by exercising his power of appointment to one of his children. (d) Upon the same principle, where lands were devised in payment of the devisor's debts, and an annuity was charged on other lands, a part of this latter was sold, and a part of the former was not, and it was decreed that the devisee of the annuity should hold the latter charged with the payment of the annuity. (e)

Though the grantee may in general assent to such a diminution of the security, yet, as a married woman cannot give any valid assent during her coverture, a court of equity will not allow a fund which secures her annuity to be diminished, though the remainder appear ample security for her interest. (f) In other cases, the court, however, has authorised the diminution of the security, where ample funds have been retained for the payment of the annuity, though great caution is required in this exercise of its power. (g)

(a) *Whitfield v. Fausset*, 1 Ves. S. 394; *Harper v. Faulder*, 4 Madd. 129.

(b) *Higgin v. Syddal*, 1 Ch. C. 149.

(c) *Proctor v. Reynell*, 1 Bro. R. Ch. 24.

(d) *Noel v. Lord Henley*, M'C. & Y. 30.

(e) *Lord Kinnoul v. E. of Bedford*, 1 Ch. C. 295.

(f) *Breton v. Lord Clifden*, 1 S. & S. 363.

(g) *Drinkwater v. Whiphram*, 3 B. C. C. 259. cit.

Extent of security cannot be diminished without the grantee's assent.

A married woman cannot give her assent.

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If the original security be increased by an act of the grantor, that additional part may, however, afterwards be removed without the grantee's consent. Thus the grantor possessed three-fourths of a manor, and charged a rent thereon, he alienated that portion to one who purchased the other part. At that time, according to the opinion of the Court, the whole manor was liable to the rent. But he devised the fourth part to another person, and they held that the grantee could not distrain upon that which was not originally charged. (a) Whatever security the grantee possesses will continue available, though he may afterwards acquire others even of a higher nature. Thus where an annuity had been granted by a deed-poll, and the grantor afterwards by his will charged it upon his real estate, the grantee was held justified in filing a bill for the arrears on the deed, and also praying to have a part of the estate set apart to secure the payment in future. (b)

How a covenant
to grant an annuity shall be
enforced.

Where there has been a due consideration, and it has been covenanted that an annuity shall be granted, but no grant has been executed, or the fund charged prove insufficient, all a man's property shall be held chargeable, except where the parties expressly provide the contrary. This was decided by the House of Lords in a case of *Griffiths v. Anvil*. (c) There a man had on his marriage covenanted to charge an annuity of a certain amount on a real estate for his wife, in case she survived him. The estate proved inadequate, and the grantor's title thereto was doubtful. The House of Lords held that his personal estate was also liable. And where a party agreed to purchase an estate for 100%. and an annuity for the vendor's life, and it was not specified how this should be secured, the Court of Exchequer decided that it should be charged on the purchased estate as well as secured by the bond and judgment of the vendee. (d)

If a man covenanted to settle an annuity out of land, and set

(a) *Gaverston v. B—*, Golds. 30 1 Leon. 85.

(b) *Grenon v. Rawson*, Sel. C. Ch. 57.

(c) *Colles*, P. C. 52. See also *Giles v. Roe*, Dick. 570, and *Matthews v. Matthews*, ib. 470.

(d) *Remington v. Deverall*, 2 Anst. 550.

has no land at the time of the settlement, but afterwards purchases land, this shall be liable to the charge, even in the hands of a voluntary devisee. And where he has lands at the time, they are bound in equity, though he die before the settlement is made. (a) It is also stated by the Vice Chancellor (b) "that a grant of a rent charge upon particular lands, in consideration of a marriage, is in equity, if the grantor be evicted from the particular lands, a general agreement to grant a rent charge of that amount to be issuing out of some lands."

But if a fund has been charged primarily, so long as it appears to be adequate to the due discharge of the annuity, a court of equity will not interfere to allocate any additional fund. This was so held by Lord Redesdale in a case (c) before him in Ireland. There A., on a separation from his wife, covenanted to pay her an annuity of 200*l.* during her life, and assigned a pension for his own life and that of I. R. to trustees, as an auxiliary fund in case of failure of payment by him: and farther, that in case of his and I. R.'s deaths in the lifetime of the wife, all his real and personal estate should be charged with the annuity. A died, leaving real estate and personalty to the amount of 16,000*l.*, I. R. also being alive. It was held that the wife had no right to have an allocation of the real and personal estate to secure her annuity, it not being alleged that the assets were being wasted, or the executor insolvent.

If the seller of an annuity falsely represent the incumbrances on the fund to be charged, and the purchaser incur expense in procuring the conveyances to be executed, he may recover that expense and also interest on the consideration money, if before the deeds are executed he find out that the fund is really charged beyond the amount so represented, and therefore refuse to complete the purchase.

The grantor will be liable for expenses incurred by the grantee through his misrepresentation of the charges on the land.

(a) *Tooke v. Hastings*, 2 Vern. 97.

(b) *In Corbet v. Corbet*, 1 S. & S. 621.

(c) *Lynor v. Mills*, 2 Sch. & L. 338.

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Lord Kenyon, in a case (a) which was tried before him, said, "That an abstract ought to mention every incumbrance whatever affecting an estate upon which any security was about to be placed, and should therefore contain an account of every judgment by which the estate was affected; that the abstract therefore in this case (which only mentioned one) was objectionable in that respect;—and that with respect to the searching for judgments, the conduct of the plaintiff's attorney had been perfectly proper, for as it was absolutely necessary to search for judgments immediately before the conveyances were executed, lest some judgment should have been entered up during the treaty, he had assigned a very proper reason for not having done so at first, namely, the defendant's assertion, that none did in fact subsist, charging the estate, except one for 1000*l.* before mentioned, and as it saved the expense of a double search for judgments."

Extent of the
power to raise
the arrears out
of the profits of
the land.

It has been intimated that where annuities are raised upon the security of a landed estate, to which the grantor is entitled, he may demise the land for a term of years, or for a greater estate, to a trustee, with power to raise the arrears from the rents and profits of the land, or from the sale thereof. In regard to what is meant by the profits of the land, the case of *Fairfield v. Weston* (b) may be consulted. There a tenant for life of a woodland estate, unimpeachable of waste, had granted a rent charge, and demised the land to a trustee for a term of years. He incumbered the estate beyond its annual value, and proceeded to cut down timber and appropriate the money raised by the sale. On a bill for an injunction by the grantee, the Vice Chancellor held, that the trustee being a termor only, and not unimpeachable of waste, could not himself cut the timber, but seemed to think that the grantee was entitled to be paid out of the price, as a part of the profit of the estate charged.

(a) *Richards v. Barton*, 1 Esp. C. 263.

(b) 2 S. & S. 96.

Where there is such a term created, or where only a right of entry is given on default of payment, and arrears accrue which cannot be paid out of the annual profits, a bill may be filed in equity to have a sale or mortgage of the land decreed, in order that such a sum may be raised as will satisfy the grantee's demands. (a)

(a) Cupit v. Jackson, 13 Pri. 721 ; M'Clel. 495.

CHAP. VII.
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CHAPTER VII.

OF THE VESTING, EXTENT, AND EFFECT OF ANNUITIES.

When an annuity vests or commences to run.

WHEN an annuity has been granted, questions will arise as to its commencement, and as to its extent in duration and in value. These will generally be answered by the terms of the instrument by which it is granted, and which discloses the intention of the parties. It is most usual for the annuity to commence from the day of the execution of the deeds, though of course any other arrangement may be made that the parties may deem fit. A. granted a rent charge to B., to begin when I. S. died without issue of his body. I. S. died, having issue, which died *sine prole*. Dyer said "the grant shall not take effect, for I. S. at the time of his death had issue, therefore the grant shall not then begin; and if not then, then not at all." Manwood observed: "If the words had been, 'To begin when I. S. is dead *sine prole* of his body,' then such a grant would have taken effect when the issue of I. S. died without issue." (a) This was indeed a contingent grant, which will be considered again in the next chapter.

In cases of legacies.

When an annuity is bequeathed by will, it seems that it commences at the death of the testator, and therefore an annual annuity would be payable at the end of a year after the testator's death; and the reason given is, that the will is the language of the testator at the time of his decease. Some doubt has been expressed whether this be a correct rule, because it is assimilated to the cases of legacies for life, in which case interest is not allowed till after a year from the testator's death. (b) But the rule is established

(a) Anon. 3 Leo. 103; 4 Leo. 232.

(b) Gibson v. Bott, 7 Ves. 967; Fearn v. Young, 9 Ves. 553; Storer v. Prestage, 3 Madd. 167.

by the last authority, (a) in which an annuity being given by will, with direction that it should be paid monthly, the Vice Chancellor held that the first payment was to be made at the end of one month from the testator's death.

Where the testator expressly appoints the commencement of the annuity, that will of course be attended to; as if he say that it is to be payable at the end of a quarter of a year after his death, it will be so paid.

Two points are yet unsettled in reference to this question in these bequests. The first is where a sum of money is directed to be placed out to produce an annuity. Lord Eldon states that it is doubted whether this is to be considered as a legacy payable at the end of a year, or as an annuity payable from the death. (b) The other is mentioned by the Vice Chancellor in *Storer v. Prestage*, (c) where he says: "When annuities are given out of a residue, and there is no time of payment mentioned in the will, it may be questioned whether the principle must not be the same as if there were one tenant for life of the residue, and the annuities be payable only from the end of one year after the testator's death."

It may be noticed, that when an existing annuity is assigned or sold, the assignee or purchaser is entitled to the payment that falls due immediately after the assignment or purchase is completed. Though when it is sold for a sum of money to be paid by instalments, it has been held that the purchaser's title commences from the time when the last instalment is to be paid. (d) An annuity sold before the Master takes effect from the confirmation of the report, and interest is payable on the purchase money from the earliest day on which it can be confirmed. (e) But the purchaser of a life interest in stock, sold before the Master, is entitled to the dividends due on the day following the sale, though the report be not then confirmed. Lord

On the assignment or sale of an annuity.

(a) *Haughton v. Franklin*, 1 S. & S. 390.

(b) *In Gibson v. Bott*.

(c) 3 Madd. 167.

(d) *Kenny v. Wexham*, 6 Madd. 355.

(e) *Twigg v. Fifeild*, 13 Ves. 517.

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A legacy of an annuity vests on the death of the testator.

Eldon observed in such a case, (a) "The report, I think, when confirmed, must have relation back to the purchase, and the contract, I apprehend, was made the moment the purchaser's name was entered in the Master's book."

Whatever doubt may exist as to the time of paying an annuity which is bequeathed, yet it vests in the legatee at the death of the testator, and the legatee has immediately thereon a vested interest in it. Hence where a testator directs that a certain sum of money shall be laid out in the purchase of an annuity, or that an annuity of a certain amount shall be purchased for a particular person, that sum of money, or the value of that annuity, becomes forthwith the property of the legatee, who may elect to take it, or have it invested as directed; and if he die before the annuity be purchased, that sum will belong to his personal representative, however short may have been the time that he survived the testator. (b) Neither does it signify that the purchase is deferred till after the determination of a life and the legatee dies previously, it still becomes the property of his representative.

Where an annuity is bequeathed to be purchased by the testator's executor, it is his duty to purchase it forthwith, that is, after the expiration of one year from the death, and not pay it out of the income of the estate, (c) unless indeed the legatee waives the annuity and agrees to take a payment from the executor (d) or residuary legatee.

At what day the rent or annuity is payable.

When annuities are granted by deed, it is the ordinary and proper course to specify on what day the payments shall be made, and from which day they will be in arrear. It has been held that an annuity payable at the Annunciation, or within twenty days after, was not due before the expiration of the twenty days after the 25th of March. (e) But

(a) *Anson v. Towgood*, 1 J. & W. 637.

(b) *Yates v. Compton*, 2 P. W. 308; *Barnes v. Rowley*, 3 Ves. 305; *Palmer v. Craufurd*, 3 Swa. 482; 2 Wils. 79; *Livesey v. Livesey*, 3 Russ. 287, 542; *Dawson v. Hearn*, 1 Russ. & M. 607.

(c) *Brown v. Spooner*, 1 Ves. jun. 291.

(d) *Brown v. Ross*, cited in *Dawson v. Hearn*, 1 Russ. & M. 608.

(e) *Blunden's C. Cro. El.* 565.

a bond to pay an annuity at Michaelmas and Lady-day, with a power to distrain if in arrear for ten days, was held to be broken by non-payment on the first day without demand. (a)

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It is to be observed that where rent is payable on a certain day, the party has the whole of that day before midnight to pay it in. But if a demand is to be made by the grantee to entitle him to a right of entry or other penalty, he should make that demand at a convenient time before sunset of that day. The payment, however, may be made at any time of that day by the grantor, and will be available, though by extreme accident the grantee should die before the expiration of the day, and another person succeeds to the rent or annuity. (b)

The next subject, namely, the Extent of the Grant, requires more examination, and will lead into more discussion. The extent of the grant embraces two inquiries. First, as to the quantity of interest granted; and, secondly, as to the amount of the value. Now the quantity of interest granted is to be considered as it affects the grantor, and as it affects the grantee.

Extent of the
grant.
1. As to the
quantity of
interest granted.

The grantor will himself be bound according to the terms of his grant, but as no obligation will extend beyond the obligor himself, without express covenant, it is laid down in Roll's Abr. (c) that if a man grant an annuity to one and his heirs, and does not say for him and his heirs, this is determined by the death of the grantor. Nor does it signify that he binds himself and his heirs to warranty, because such a covenant cannot enlarge the grant. But an heir cannot object to the grant of annuity that it is made to commence after the death of the grantor, if he be bound by the terms of the grant, and have assets. (d)

1. With refer-
ence to the
grantor.

He must bind
his heirs ex-
pressly or they
will not be
liable.

Where a corporate body grants an annuity in its cor-

Corporations
continue bound.

(a) *Glover v. Creed*, 2 Keb. 415.

(b) *Clun's C.* 10 Co. 127; *Duppa v. Mayo*, 1 Saund. 287, and the notes thereon.

(c) *Annuities*, B. 1. See also Co. L. 144 b.

(d) *Tewkley v. Clotworker*, Litt. R. 245; *Het.* 137.

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Heir not liable
without assets.

Unless the land
is charged.

The charge con-
tinues when the
property on
which it is
secured is re-
newed.

porate capacity, the successors will be bound by the grant, though not named therein, because the granting body still continues. Thus a grant made by King Henry VIII. was held to be binding upon Queen Elizabeth, though the king had not mentioned his successors in the grant, but had granted it in his politic capacity of king. (a)

An heir, even though mentioned, will not be bound unless he have assets, (b) and therefore when an annuity is claimed by prescription, he is not liable personally, because it cannot be known whether he has assets from the original grantor.

But it is only where the annuity is secured by a mere personal obligation, that the heir is not bound, for where the land is charged, that charge remains thereon wherever it goes, whether to a devisee or an heir, though not named in the grant. (c)

So also the assignee of land takes it subject to all incumbrances previously created by assignor, and is liable to the payment of rent charged thereon. Thus the crown, on forfeiture for treason, and, consequently, the crown's grantee, takes the estate subject to rents charged previously to the forfeiture, though voluntarily. If the charge were created with a view to diminish the benefit of the estate when it should come to the crown on forfeiture, that charge would be void. (d)

If an annuity be granted and be secured upon the grantor's temporary interest in a certain property, the security is held to continue when that interest is renewed. As in the cases of ecclesiastical leases, which are granted for years or lives renewable at stated intervals, or as the lives drop. In the case of *Maxwell v. Ash* (e) an annuity had been granted and charged on a lease for lives of tithes under the Bishop of London, it was held that it continued a charge on the lease renewed after the death of all the lives. And after-

(a) Sir T. Wroth's C. Plow. C. 457.

(b) Co. L. 102 a.

(c) *Fulwood v. Ward*, Poph. 87; *Dyer*, 344.

(d) *Duke of Bedford v. Coke*, 2 Ves. sen. 116.

(e) 1 B. C. C. 444 a; 7 Ves. 184.

wards, in *Moody v. Mathews*, (a) a similar charge was created on a lease for years of tithes, with a covenant by the grantor for further assurance. The lessee surrendered the lease and renewed it, then married and died. Her husband administered to her and renewed it again with his own money. It was decided by the Master of the Rolls to be a continuing charge upon the renewed lease, though probably the grantee could not have compelled the renewal. And there are two cases which may be mentioned here, though they occurred in Ireland. They are cases of bequests. In *Winslowe v. Tighe*, (b) a testator bequeathed an annuity, and charged it upon his leasehold interest during the term of his lease. It was held to extend as a charge upon every renewal obtained by the devisee of the leasehold estate. And so also it was determined in *Stubbs v. Roth*, (c) where the testator had added to the charge, "Provided my interest in the lease thereof should so long continue."

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In both these latter cases the annuitant was made to contribute towards the expense of the renewals. But in the other two cases it was expressly decided that the grantee could not be called upon for contribution. Certainly as the interest which is charged is only a security for the annuity, there seems no reason for requiring the grantee to supply funds for the maintenance of that security; as against the original grantor there could be no ground whatever for such a call, and the party claiming the interest must stand in the same situation as the party through whom he claims. There is a case of *Stone v. Theed*, (d) where also the grantees did not contribute, but that was the case of a bequest, and the Lord Chancellor found an intention on the part of the testator that the whole expense should come out of his general estate.

The grantee is
not liable to
contribution
on renewal.

There is also a very late case (e) in the House of Lords, where the grantees were made to contribute to the charges

(a) 7 Ves. 174. See also *Haig v. Homan*, 4 Bli. P. C. 380.

(b) 2 Ba. & Be. 194.

(c) *Ib.* 548.

(d) 2 B. C. C. 243.

(e) *Haig v. Homan*, 4 Bl. P. C. 380.

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of renewals, but there the parties had offered to submit to such terms as were fit and reasonable, and as the security had been given subject to the rent and the fines, it was held reasonable that they should be paid before the grantor's annuity. An observation of Lord Lyndhurst, in his judgment on the case, may be cited here. "If," he said, "I grant an annuity to my creditor and charge it on a leasehold estate, it is perfectly clear that substantially, generally speaking, the security he derives, if there be no covenant to the contrary, is a security upon the beneficial interest in the lease; that is to say, that he takes the lease and comes into the shoes of the assignor, and pays the rents and fines which must be paid in order to give him the benefit of the security."

Distinction between the charge on a fund and an assignment thereof.

But it is necessary to keep distinguished the cases where an annuity is charged on an interest, and where that interest itself is parted with, because the grantee or assignee will not be entitled to the renewed interest in such cases, unless it has been so provided. This appears exemplified in *Clay v. St. John*.^(a) There a pension from the crown during pleasure had been sold and determined by the decease of the king. A new pension for the same amount was granted by the successor to the same person, and the instrument of grant recited the former grant. The Vice Chancellor decided that the purchaser was not entitled to the new pension.

Extent of grants by joint grantors.

Where there are joint grantors, the extent of the grant is sometimes affected by the interest they possess in the land charged. As joint tenants have only one joint interest, though they join in the grant, only one rent will be created, but tenants in common have several and distinct interests, and therefore the grant of a rent by them jointly will operate on their several estates, and create several rents to the grantees, as if they made distinct grants.^(b) "And no language," says Mr. Preston,^(c) "expressive of an intention to grant one rent, will be effectual to that end." To

^(a) 2 S. & S. 36.

^(b) *Windham's C. 5. Co. 8*; *Co. L. 197. a.*, 267. b.

^(c) 2 *Abs.* 77.

enable tenants in common to make a single grant, he suggests that they should join in conveying the fee to uses, and create the rent by a declaration of use; in which mode there would be only one rent.

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Again: a rent may be severed in respect of the cause of the grant, as where one co-parcener grants a rent to two other co-parceners for equality on partition, though the words may be joint, yet the cause shall be respected, and the rent shall be of the quality of the land, and therefore they shall have the rent in degree and quality of co-parcenary, and not jointly. (a)

Where an annuity is granted, however, the case is different, for though there be several grantors, who covenant severally and jointly, yet only one annuity shall be claimed, and though there may be several actions against them, there shall be only one satisfaction. (b)

The next subject of investigation is the extent of the grant as regards the interest of the grantee. This also depends upon the language of the instrument; where it is explicit, no difficulty of course will arise, but where not, in the interpretation to be given to it, some assistance may be obtained from the rules established by the following cases. Some difference will be found to prevail between a rent and an annuity, and perhaps they may be well treated separately.

2. With reference to the grantee.

When a rent is granted to a man, it has long been determined that this will amount to a grant for his life; (c) unless there be some words expressed therein to limit this extent, as if an annual rent of two marks be granted to A. till ten marks are levied, this is a grant for five years only; or if there be a grant to A. till the grantor's son comes of age, it will be determined by that event. The habendum will also restrict the extent of the grant, if it be consistent therewith, as a grant to A. to have and to hold it for seven years, would only last so long. At the same time, the grant will not be affected by a void or inconsistent habendum, as

In rents.

(a) Windham's C. 5 Co. 8. b.

(c) Perk. Grants. s. 104, 105.

(b) Co. Lit. 144. b.

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a grant to A. payable yearly, to hold for two days, A. would take it for his life. (a)

"If," says the author of the Touchstone, (b) one devises to J. S. that if he and the heirs of his body be not paid twenty pounds rent yearly, he and they shall distrain, &c.; by this devise J. S. hath an estate tail of this rent. But if the devise be that if J. S. be not paid 20*l.* yearly, he shall distrain, &c. by this devise J. S. hath an estate for life only. So if one devise a rent of 10*l.* out of his land to be paid quarterly, and say not how long the rent shall continue, this is but an estate for life."

The grantor's estate in the land will also limit the extent of the grantee's interest. For a tenant in fee simple may grant for life, but tenant in tail can only grant during the joint lives of himself and the grantee, while a termor's grant will extend during the grantee's life, if the term last so long. (c)

But any intention on the part of the grantor, if it can be gathered from the instrument, will extend the grant beyond these rules. In an old case of *Gough v. Howard*, (c) it appeared that one Butler died possessed of a lease of twenty-eight years in two houses, and by his will devised both tenements to his wife for the whole term, if she should so long live and continue a widow, and if she married again, then he devised to her only his dwelling-house, and also 20*l.* rent per annum out of the other house, not mentioning what interest she should have in the rent. She married and died before the term of years expired. The Court of King's Bench, after a long argument, were divided in opinion whether the rent continued after her death during the term or not. Coke, C. J. and Haughton J. held that it did; Doddridge, J. and Croke, J. that it did not; and the arguments of all the judges turned entirely upon the intention of the testator, as they differently interpreted it.

But a rent may be granted to a man to hold for a term of

(a) *Plow. Com.* 152.

(b) *P.* 443.

(c) 3 *Buls.* 121; 1 *Roll. R.* 247. 368; *Bridg.* 54.

years or in fee, or during the existence of a life or lives. In any of these cases the grantee may assign away the rent, and it shall extend to the assignee during the duration of the term granted. But this point has not been determined, whether if a rent has been granted to A. and his heirs, and he assigns it in fee, it will continue after the failure of A.'s heirs? it should seem not.

When a rent is granted for a term of years, it will pass on the death of the grantee to his personal representative with the rest of his personal estate. (a) Where granted in fee, it will descend, on default of assignment or devise, to his heir, unless otherwise provided by the grant. In regard to a freehold rent, that may be to continue during the grantee's own life, or during the life of some other person. In the former case the rent will not extend beyond his life, but in the latter case it may continue long after his death. Some questions have arisen on this point. At the common law, when a rent was granted to one during the life of another, if the grantee died before the annuitant, the rent ceased, because, as Lord Holt has observed, (b) there was no grantee of the residue, and there could be no occupancy of an incorporeal right. But there might be something like a special occupancy of a rent, as if it were granted to A. and his heirs during the life of B., it was held that on A.'s death his heir would take the rent, as a party specially nominated: (c) though the estate in the rent was not a fee but an estate for life only. (d) There was an early case (e) where a rent was granted to one and his heirs during the lives of himself and three others. It was urged that on his death the rent could not descend upon his heir, because the grantee's own life was in law of higher value than those of the stranger, and therefore these additional lives could not extend the grant beyond his life. The Court of Common

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A rent, while it continues, is payable to the grantee's assignee.

A rent granted to A. for the life of another now passes to A.'s heir or executor, according as the heir is named or omitted in the grant.

(a) Darrel v. Wilson, Cro. C. 644.

(b) In Smartle v. Penhallow, Salk. 189. See also Savery v. Dyer, Amb. 139; Holden v. Smallbrooke, Vaugh. 199.

(c) Cro. J. 282.

(d) Moore, 876.

(e) Anon. Godb. 172; Bowles v. Poor, 1 Buls. 135; Cro. J. 282.

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Pleas held that the heir was not entitled; the Court of King's Bench, however, on a writ of error, decided that in order to prevent occupancy the rent should pass to the heir. But the grant of a rent to A., his executors, administrators, and assigns, during the life of B., was held not to pass to his administratrix on his death, because she could not be the special occupant. (a) It will be readily seen that this does not in effect differ from a grant to A. alone, because all men who die possessed of property will leave either an executor or administrator.

The statute of frauds, 29 Cha. II. c. 3. s. 12, has, however, made all estates *pur autre vie* devisable, and has also enacted that such estates where there is no special occupant, shall go to the executor or administrator of the party, and be assets in his hands. And the 14 Geo. II. c. 20. s. 9, has directed that in the case of intestacy such an estate should be applied and divided as the other estate of the deceased. Since these statutes, therefore, a rent though granted only to a man during the life of another, shall, on the death of the grantee before the annuitant, extend to his executors. Such an opinion was given in *Hassell v. Gouthwaite*, (b) by the Court of Common Pleas, though they did not decide it. And Lord Ch. Harcourt, in *Rawlinson v. Duchess of Montague*, (c) had also expressed a similar opinion as to the effect of these statutes. But as no decision was required on this point in either of these cases, a doubt was still entertained whether they did apply to cases of rents where there can be no occupancy. Mr. J. Blackstone, in his Commentaries, (d) thought that they were not within the acts, and the point has been argued with great learning by Mr. Bythewood. (e) The Court of Common Pleas have, however, very lately decided that this enactment of the statute of frauds extends to all matters commonly treated as subjects of special occupancy, although not strictly such in technical language, and therefore where

(a) *Salter v. Butler*, Yelv. 10; Cro. El. 901; Mo. 664; Noy, 46.

(b) *Willes*, 505.

(c) 3 P. W. 264. n.

(d) Vol. 2, 260.

(e) 1 Prec. Con. 588.

a rent charge was granted to one Dixon Bearpark, during the life of the grantor, before whose death D. B. died, his executor, though not named in the grant, was held to be entitled to the rent during the life of the annuitant. (a)

Where a man is seised of a rent to himself and his heirs during the life of another, if he devise it to A. that will only confer an estate for life upon A., and, if the estate in the rent continue after A.'s decease, it reverts to the heir of the devisor, as special occupant under the original grant. (b)

Now as to annuities. The extent of these is also to be determined by the language of the grant, but it must be remembered, that it is a species of personal property, although, as before shown, it may be extended for a perpetuity, inasmuch as it may be granted to a man and his heirs. The reader is referred to the discussion in a former page (c) as to the extent of the grant of an annuity to the grantee's assignees. If an annuity be granted to a man and his heirs, on his death it will, like a rent, descend upon his heir. (d) But where it is granted to a man without mention of his heirs, as Lord Hardwicke (e) has said, "being a personal thing, in order to be given to another it wants no words of limitation, if it is to continue after the death of the grantee it goes to his executor." Whether it is so to continue or not is a matter of interpretation of the grant. In the same case Lord Hardwicke states this general proposition, "If one gives by will" (and the effect would be no doubt the same in a grant) "an annuity not existing before to A., A. shall have it only for life, for if A. might give it to his executor, it might go from executors to executors for ever. But if it were granted to A. during the life of B: and A. dies before B., then it shall go to A.'s executor." This was supported by *Gosley v. Gifford* and *Lock v. Lock* in 2 Vernon. The first (f) was the devise of an annuity to

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As to annuities.
Their extent depends on the
language of the
grant.

(a) *Bearpark v. Hutchinson*, 7 Bing. 178.

(b) *Doe d. Jeffs v. Robinson*, 8 B. & C. 296.

(c) P. 23.

(d) Above, p. 16.

(e) In *Savery v. Dyer*, Amb. 139; 1 Dick. 162.

(f) P. 35.

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E. S. out of a lease for years determinable on lives, to be paid half-yearly, if the lives should so long continue. It was held to pass to E. S.'s executor, she dying before the lives had ceased. The court interpreted the testator's intention to have been to continue the grant during the duration of the term. In the second case (a) a college lease was devised to the testator's wife for life, remainder to his son, and he directed her to pay 10*l.* per annum to the latter during her life. On his death before her the annuity was held not to determine, but to continue to the son's executor. The case before Lord Hardwicke was a bequest of an annuity to the testator's kinsman, to be paid by the executor during the life of the executor, before whose death the legatee died, and the annuity was continued to his executor according to the general rule, there being nothing to show any intention in the testator to confine it to the legatee's own life.

And intention
of the grantor.

But where the intention of the grantor appears to restrain the extent of the grant, that intention shall be carried into effect as is shown by *Neal v. Hanbury*. (b) One John Neal devised an annuity to his nephew Thomas during the life of the devisor's wife, on condition that he behaved civilly to her. She survived Thomas. The Master of the Rolls held, that being a personal bequest to Thomas, and conditioned for his good behaviour to the devisor's wife, which could not be after his death, it could not have been intended to continue after that event, and therefore that it was determined.

And a case, (c) which is to be found in *Lutwych*, was decided in a similar manner upon the ground of intention. One William Waite having married Katherine, a widow entitled to dower, Sheppard, the husband of the heiress, bound himself in a bond to Waite to pay him 10*l.* a year during the life of his wife, in full satisfaction of all thirds and payments whatever payable to him in right of his wife Katherine out of the defendant's estate, and Waite covenanted to receive

(a) P. 666.

(b) *Prec. Ch.* 173.

(c) *Reeves v. Sheppard*, 1 *Lutw.* 323.

it in satisfaction of his said right. It was held that on Waite's death his administrator could not claim the annuity as continuing, though the wife was still alive. By the intent of the articles it was to continue only during the joint lives of the husband and wife.

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Even though a term of years be expressly created, yet the annuity shall not continue so long if the intention of the grantor appears to have been to limit the extent. This is illustrated by the late case of *Barford v. Stuckey*.^(a) B. J. Bartlett and W. Stuckey, by deed reciting that J. Stuckey had left them estates in strict settlement, with remainder over, on failure of issue male, to N. Pitts, out of regard to N. P., and considering that J. S. had made no other provision for him, agreed with N. P., his executors and administrators, to pay him an annuity for twenty-one years, if B. J. B. and V. S., or the survivor of them, should so long live, and in case of N. P.'s death within the term, to his child or children, if any, in such proportions as he should appoint, or in default of appointment to all of them equally, and if there should be no child, to his wife so long as she should be a widow. N. P. covenanted that in case he or his heirs should come into possession of the said estates, he, his heirs, executors or administrators should repay all sums received by him, his children or wife on account of the annuity. N. P. his wife and child died within the term; and the Court of Common Pleas decided that the deed did not operate as a grant of an annuity for twenty-one years absolutely, but that it was intended as a provision for N. P. and his family only, and was determinable on the death of N. P. his wife and child. Therefore N. P.'s administrator had no right to the annuity for the residue of the term. Which judgment was confirmed by the Court of King's Bench on a writ of error.^(b)

The rule is applied by Lord Hardwicke to the case of a new annuity, and it will readily be admitted that where an annuity is assigned the assignee will hold it according

(a) 1 Bing. 225; 8 Mo. 88. (b) 3 B. & C. 308; 5 D. & R. 118.

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certain grants.

to the terms of the assignment, but subject to the extent in the original grant. Of course, if assignable at all, it may be assigned in part or in full.

As it is not uncommon to grant an annuity on several lives, care should be taken to state accurately whether it is to be confined to the joint endurance of the lives, or to extend to the life of the survivor, because doubts sometimes arise on this point. In *Slater v. Carew* (a) it was decided that a bond to secure the payment of an annuity to a man and his wife *during their two lives*, became extinct on the death of either. But in a late case, (b) the father of two illegitimate children granted an annuity during the joint natural lives of the mother and the two children for their support, or in case of the death of the said children, during the life of the mother. One of the children having died, the Court of King's Bench held that the annuity was intended to continue during the life of the mother at all events, and was therefore still payable. This is somewhat similar to *Cowper v. Scott*, (c) where a man by his will directed his trustees to pay to his son and his son's wife 100*l.* during their respective lives, 60*l.* to be paid to the wife for the better support of herself and daughter, the remaining 40*l.* to go to his son. The son having died before the testator, the Lord Chancellor held that the wife was entitled to the whole annuity of 100*l.* Where, however, a man on the marriage of his daughter covenanted to pay his son-in-law and daughter 20*l.* per annum, without saying for how long, the court, according to Levinz, doubted whether it should continue for the husband's or wife's life, but according to Siderfin and Keble, it seems to have been decided that it was to continue during their joint lives, on the ground that the maintenance should be as durable as the marriage. (d) In another case, where a widow, on a second marriage, covenanted that her husband should enjoy her property during their joint lives, and he

(a) 1 Mad. 187. (b) *James v. Tallent*, 5 B. & A. 889; 1 D. & R. 548.

(c) 3 P. W. 121.

(d) *Hookes v. Swain*, 1 Lev. 103; 1 Sid. 151; 1 Keb. 511, 517, 555.

covenanted to pay her 20*l.* per annum, it was adjudged to continue during their joint lives only, as the other covenant was such. (a) An annuity granted by a parson to a woman who had an equitable interest in an advowson, so long as they should live together (*insimul cohabitarent*), was held to mean so long as they should both live, and not to refer to the place. (b)

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The grantees of the rent, or annuity, where there are several, may also take as joint tenants or as tenants in common. Except in the case already referred to, (c) where the grant is in satisfaction of a right to partition, in which instance the grantees take by the rule of law according to their co-parcenary rights, it is purely a question of construction on the instruments, whether a joint-tenancy or a tenancy in common is granted. There is a case which was very much discussed in the Court of King's Bench, and is reported in a variety of books under the name of *Ward v. Evans* or *Everard*. (d) There a man granted an annuity, or yearly rent of 100*l.* to five persons by name, to be equally divided among them, *videlicet*, 20*l.* to each, to have and to hold to them and their assigns for their lives, *videlicet*, 20*l.* to each of them respectively, and that on the death of any of them, the share of the party so dying should be paid equally to the others, but that there should be no survivorship of the two last. It was disputed whether this was the creation of a joint-tenancy or a tenancy in common in the rent, and the King's Bench seem ultimately to have decided that it was the former. On the other hand, where an annuity was bequeathed to the children of A., in equal shares and proportions, to continue during their lives and the life of the survivor of them, it was held that the children took as tenants in common, and that there was no survivorship among them by implication, therefore that the share of one who died went to his representative. (e) See also *Vandergucht v. Blake*, 2 Ves. jun. 535.

Joint grantees of
the rent or an-
nuity.

(a) *Death v. Beans*, 1 Lev. 103. (b) *Gatland v. Chatfield*, 1 Lutw. 556.

(c) P. 257.

(d) 5 Mod. 25; 12 Mod. 227; Salk. 390.

(e) *Jones v. Randall*, 1 J. & W. 100.

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A bequest of an annuity to A., B., and C., and their heirs, and the survivor of them, "in the order in which they are now mentioned," creates a joint tenancy therein, and if A. die first his share will be divided equally among B. and C., and the words "in the order," &c. being repugnant to the bequest already made, are to be rejected.^(a)

As to whether one or more rents be actually granted, see *Woodley v. Bere*.^(b) There one granted a rent charge of 14*l.*, to have one moiety 7*l.* for thirty-eight years ensuing the date of the grant, the other moiety for the like term after the death of J. D. This was the grant of two several rents, since they were severed in the habendum, and had several beginnings, and several endings.

II. Extent in
value.

The second branch of the inquiry into the extent of the grant relates to the value; since when a mere sum of money is mentioned, it becomes a question whether any and what deductions are to be made. Now deductions may be chargeable in respect of the difference in currency, and of the expenses of collection, transmission, or payment, or in respect of the public taxes or impositions. Here, as in all the subjects of this chapter, the interpretation of the instrument must be the principal guide.

First head, as to
the difference of
currency and
costs of pay-
ment.

With reference to the first head, namely, the difference of currency and the costs of transmission and payment, there have been a few cases which do not lay down any precise rule, but must be introduced. In *Wallis v. Brightwell*,^(c) one residing in England made his will here, and charged an annuity on lands in Ireland, in trust for his wife, who, as well as her trustees, lived in England, the Lord Chancellor held, that it should be paid in England, in English currency, and free from any deduction for the expense of remittance. So also a case is cited in 1 E. C. A. 289, on the Earl of Donegal's will, who, living in England, devised a rent charge out of his estate in Ireland, and it

^(a) *Smith v. Pybus*, 9 Ves. 566.

^(b) *Sir W. Jo.* 267; *Cro. C.* 154. See also *Duke of Bolton v. Williams*, 4 B. C. C. 297; 2 Ves. J. 138.

^(c) 2 P. W. 88.

was held that it should be according to the English value, the will being made here. The subject has also lately undergone much consideration in the House of Lords, (a) the result of which appears to have been, that though the intention of the parties is to be the principal guide, yet in the absence of all expression of any such intention various subjects are to be considered. Thus, in reference to the currency, it may be proper to consider the domicile of the parties, the place of the contract, the place appointed for payment, the purpose of the grant, and the various provisions and expressions of the instrument. In the case before the House, there was a power in a marriage settlement to grant to a wife a rent charge to be tax free and without any deduction, and to be issuing out of and chargeable upon lands in Ireland, so that such rent charge did not exceed the yearly sum of 3000*l.* of lawful money of Great Britain. It was held, that though charged upon lands in Ireland, yet the intention was clear that the amount of the rent charge was to be paid in English, and not Irish currency, but that the appointee could not claim it free from the expense of conveyance and exchange properly so called, since it was necessarily to be paid in England. In this case the deed creating the power was executed in England, all the parties thereto, as well as the Marchioness herself, in whose favour the power was executed, were resident in this country. From the arguments and judgment in the case it may be inferred, that in the absence of all evidence of a contrary intention, a charge on land would be payable in the currency of the country where the land is situated.

By the 6 Geo. IV. c. 79, the currency of the United Kingdom is assimilated in all matters done after that act relating to money, it was held, that where a testator made his will in Ireland, in 1821, and became domiciled in England, and died there in 1827, after that act had passed, a rent charge devised in that will was to be computed according to the Irish currency, because, though not a perfect

(a) *Marchioness of Lansdown v. Marquis of Lansdowne*, 2 Bl. P. C. 87.

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Second head, as
to the deductions
for taxes and
impositions.
Deduction for
the land tax.

bequest before the death, it was a gift made at the making of the will, which was prior to the act. (a)

On the other head, namely, the deductions to be made in respect of public taxes and impositions, many cases have been discussed. The principal tax which interferes with this subject is the land tax. By the statute 4 & 5 Will. III. c. 1, a tax of four shillings in the pound was imposed on land, and by sect. 5 and 6, where lands are charged with rents or annuities, the landlords or owners are empowered to deduct the tax of four shillings in the pound for such rents, which deductions shall be allowed by the party entitled to the residue. In sect. 24 there is a proviso that nothing in the act shall invalidate any contract, covenant, or agreement between the parties respecting the payment of taxes. The provisions of this statute were continued by annual acts until the 38 Geo. III. c. 60, by which they were made perpetual. The first case that arose was *Brewster v. Kitchen*. (b) There a rent charge in fee was granted in 1649, with an indorsement on the deed "that the true intent and meaning of the presents was, that the rent charge should be paid without any deduction, abatement, or defalcation, for or on account of any taxes on the land or the said rent." It was held, that as there had been a tax in the nature of a land tax imposed by the Parliament, a short time before the grant of the rent charge, the grantor must have intended to provide against any similar deduction, and therefore the rent was to be paid free from the land tax imposed by the statute of Will. III. though long subsequent. But in *Green v. Marygold*, (c) A. by his will in 1677 charged his lands with an annuity to his wife, without any deductions, in satisfaction of her dower, the Master of the Rolls decided, that the annuity was subject to the land tax. He argued that this did not fall within the exception, it being a devise, and not a covenant or agreement, and that the word "deductions" could not apply to

(a) *Holmes v. Holmes*, 1 Russ. & M. 660.

(b) 1 Lord Raym. 117; 5 Mod. 369; Salk. 198, 615; Carth. 438.

(c) Vin. Abr. Devise, M. (d.)

taxes, which the deviser would have used if he had meant to exclude them.

Again: in *Villa Real v. Lord Galway*,^(a) the devise was, "To my dear wife, one annuity or clear yearly sum of 200*l*." Lord Camden considered that the land tax was to be deducted, that the exemption was not expressed, and that the act was an annual charge, and every person possessed of such an estate must take it subject to the parliamentary burthen. The tax being now perpetual, that part of his lordship's reasoning would not now apply. And, also, where an annual sum was charged on land by way of mortgage, in satisfaction of dower, the Court of Chancery held, that being an annual payment secured by land, it should answer taxes in proportion as the land paid.^(b)

But, on the other hand, a fee-farm rent, (which corresponds in some respects with a rent charge,) granted without any deduction, defalcation, or abatement, for or in any respect whatsoever, granted in 1693, was held to be payable free from any deduction for the land tax, as no words could be stronger than those.^(c) There is also a case^(d) shortly reported in 2 Atk. p. 393, of a devise of a sum of money, to be laid out in the purchase of an annuity *clear* for A. The Lord Chancellor said, "I must direct the trustees to lay it out in the purchase of an annuity, *free from taxes*, which is the proper meaning of the word *clear*." With reference to this word, however, a subsequent case must be noticed, in which Lord Hardwicke put a less extensive construction upon it. In the *Earl of Tyrconnel v. Duke of Ancaster*^(e) power was given to a husband to make a jointure, not exceeding in the *clear* yearly value 100*l*. for every 1000*l*. portion; the same lord decreed that the jointure was not exempt from the land tax, holding it to be a right rule to construe the word

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(a) 1 B. C. C. 292, Eden's note.

(b) *Atwood v. Lamprey*, 3 P. W. 127, n.; *Legat v. Shewell*, Gilb. R. 141.

(c) *Bradbury v. Wright*, 2 Dougl. 624.

(d) *Hodgeworth v. Crawley*.

(e) 2 Ves. S. 500.

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"clear," where it is used alone, as it would be between buyer and seller of estates. Where, however, there was a power to settle a certain annuity by way of jointure without any deduction or abatement for any taxes, charges, or impositions imposed or to be imposed parliamentary or otherwise, Lord Hardwicke held this to be a clear discharge from all taxes in existence at the time it was executed, whether fixed or fluctuating, and therefore that the widow should not be liable to a deduction for the land tax. (a)

It seems, therefore, that no general rule can be stated upon this point, but that it depends upon the construction of the instrument of conveyance.

Not to be deducted from a personal annuity.

Where the annuity is altogether a personal obligation, there can be no deduction for this tax. And it is not material that the party who bequeaths it is possessed of a term for years, because that term is no otherwise charged than as being part of the personalty. (b) In like manner where an annuity, having been granted with a mere personal security, is subsequently charged on land, it is payable without deduction, because the previous grant cannot be diminished by the additional security. (c) And even where a testator devised an annuity to be charged on land, and the tenant entitled to the land entered into a personal security by recognizance to pay the annuity, so that it was not actually charged on the land, and no tax was paid, it was decided that there was no ground for deducting the tax, as it had not been paid, though, if the annuity had been charged on land, it would have been liable to the deduction. (d)

The rent is to be taxed in proportion to the land in the district.

It will be observed that the statute enacted that every annuity or rent charge should be taxed at the rate of 4s. in the pound, that is to be understood only where a rate to that extent is imposed on the lands in the district whence

(a) *Lady Blandford v. Duke of Marlborough*, 2 Atk. 542.

(b) *Robinson v. Stephens*, Salk. 616. See also *Grimstone v. Lord Bruce*, ib. 156.

(c) *Ib.* *Green v. Green*, cited in *Gilb. E. R.* 142. 1 B. P. C. 143, 2d ed.

(d) *Legatt v. Shewell*, *Gilb. R.* 141. See also *Lysons v. Varnen*, Sel. C. in Ch. 25.

the rent issues, since where the general rate is less, the annuity shall be taxed proportionably. (a)

Where the landowner neglects to deduct the tax, or the grantee improperly allows it, the law will not compel the other party to refund. (b) In one case, where an annuity had been paid to a relative for sixteen years without any deduction for the land tax, Lord Hardwicke held, that, as between such parties, he would presume the annuity to have been so paid by mutual consent, and would not compel the amount of the tax to be recalled. (c)

Such have been the cases on the land tax. The reader will remember that the property tax was a tax imposed upon the property of all individuals, and it was intended that it should be paid by those only who were presumed to be in the enjoyment of property, accordingly it was enacted by 46 Geo. III. c. 65, s. 115, that all contracts for the payment of any rent or annuity in full, without allowing the deduction for that tax, should be void. On this it was determined that a covenant to pay an annuity free from the property or income tax was not wholly void, but only to the extent of that disallowance. (d) That statute was held to have a retrospective effect, and rendered contracts void which were opposed to it, though executed before it passed. (e)

With regard to other public and parochial taxes, as they are charged upon the occupier of the land, and do not fall on the grantee, it does not appear that his grant is to suffer any diminution on their account.

Annuities bequeathed by will, as shown above, are subject to the payment of a certain legacy duty. This duty is a diminution of the legacy, and a testator may desire to prevent its falling upon the legatee. The intention, if

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If paid improperly it is not to be refunded.

Deduction for the property tax.

Deduction for the legacy duty.

(a) *King v. Weston*, 2 E. C. A. 62. *Atwood v. Lamprey*, 3 P. W. 127, n. *Randall v. Brook*, 7 B. P. C. 1, ed. To.

(b) *Atwood v. Lamprey*, cit. above. *Andrew v. Hancock*, 1 Br. & B. 37.

(c) *Nicholls v. Leeson*, 3 Atk. 573.

(d) *Howe v. Singe*, 15 East, 440.

(e) *Readshaw v. Balders*, 4 Taunt. 57. *Buxton v. Monkhouse*, Coop. 41.

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clearly expressed, is conclusive of course, but the expressions of the testator may be ambiguous, and resort must be had to interpretation. Where an annuity is granted free from deductions this rule is established,—that if from the nature of the property out of which the annuities are payable there be no deduction to which they could be subject except the legacy duty, the annuitant shall be exempt therefrom, but if there be any other subject of deduction, then he will be held liable to pay the duty. In *Smith v. Anderson*,^(a) where this rule was stated by the Master of the Rolls, reference was made to *Hales v. Freeman*, where this exemption might, as it is said, have been claimed, but was not. But on examining that case it will be found that it was a rent charge that was devised, which is liable to the land tax, and therefore there was a subject to which the word “deductions” would apply besides the legacy duty. In a subsequent case^(b) before the Vice-Chancellor, where an annuity was bequeathed clear of all deductions whatsoever, payable out of certain stock in the funds standing in the testator's name, neither the principle above expressed, nor the case itself, appears to have been referred to, and the court held that the legacy tax could not be deducted. Unfortunately, the words of the judgment of the Vice-Chancellor are not reported, for it is difficult to find any other subject than this tax to which the testator's language can apply.

And still later, in *Burrows v. Cottrell*,^(c) a testator gave an annuity of 300*l.* free from all taxes and stamp duties, to I. and H. during their joint lives. By a codicil he revoked the annuity of 300*l.*, and gave them a *clear* annuity of 100*l.* each. The Vice-Chancellor held that this was a complete gift separate from that in the will, and that the annuity was subject to the payment of the legacy duty.

The executor may recover from the legatee the amount of the legacy duty, though he has neglected to deduct it.

By the stat. 36 Geo. III. c. 52, s. 6, the executor is made liable to the government for the payment of the legacy duty as well as the legatee, and as the duty on an annuity

^(a) 4 Russ. 352.

^(b) *Dawkins v. Tatham*, 2 Sim. 492.

^(c) 3 Sim. 375.

is paid by instalments, an executor may pay that duty, and can recover it back from the legatee of the annuity, although he may have made several payments of the annuity without deducting it; there is, therefore, a difference in this respect between the deduction for the legacy duty and for the land tax. Here, also, the legatee had assigned the annuity, but that was held to be immaterial. (a)

Such are the observations and the rules which occur in reference to the deductions to be made in the grants of an annuity; it remains to be mentioned, that there is no power in a court of equity to compel the grantee to contribute towards the expenses necessary for the maintenance or repair of houses or lands on which the rent may be secured. (b) Neither is any allowance to be made for insurance or other similar charges. At the same time, the grantee has not, without express provision, any right to call upon the tenant to maintain the same, or keep it in repair. Hence it is considered requisite to insert in the grant a covenant, on the part of the grantor, to insure houses which are the security for the due payment, or at least to allow the grantee to do so, and charge the amount against the former.

But in a late case, (c) where a testator charged by his will an annuity on his real estate, consisting of a tavern, which he had insured, and which was burnt down after his death, the insurance money was ordered to be paid into court, on a motion by the grantee, in a suit instituted against the executrix for the administration of the testator's estate, though the latter had renewed the policy with her own money.

Before concluding the subject of the extent of the grant, one other point requires to be noticed.

In testamentary bequests it has sometimes happened that a question has been raised from the use of language applicable to legacies, whereby the testator alters his previous bounty. The rule is, that where there is nothing on the face of the will to show a contrary intent, the bequest of an

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The grantee not
liable to deduc-
tions for repairs
or insurance.

How far be-
quests of annui-
ties correspond
with other
legacies.

(a) *Hales v. Freeman*, 1 Br. & B. 391; 4 Mo. 21.

(b) *Shelly v. Lady Earsfield*, 1 8vo. Rep. in Ch. 206.

(c) *Parry v. Ashley*, 3 Sim. 97.

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The effect of the
grant of the
annuity in re-
gard to other
rights in the
grantee.

annuity is to be treated as that of any other legacy, and if any provision be made by the testator for or in respect of his legacies, the same shall extend to annuities. Thus in the Duke of Bolton's will, cited by Lord Eldon in *Nannock v. Horton*, (a) a charge of legacies upon land was held to be a charge of annuities. So also where a residuary bequest was made in favour of legatees, it was held to apply to annuitants. (b) While in the case of *Nannock v. Horton*, under a residuary bequest to the legatees in proportion to their legacies, annuitants upon the construction of the whole will were excluded.

The last subject which is proposed for consideration in this chapter is the effect of the grant as regards other rights in the grantee. In most instances undoubtedly the parties express in the instruments of the grant their intention as to their real object in the transaction, and the effect they intend to result, where that effect is honourable or proper. And even where the deeds are ambiguous, the parties have generally some mode of explaining their intentions. Hence in contracts between distinct parties it is only necessary to refer to the ordinary rules by which such contracts are regulated. But where annuities proceed from the sole act of the grantor, more especially if they be legacies, the intended effect is by no means so easily discovered. The enquiry however into this intent is almost confined to courts of equity, for the courts of law have seldom jurisdiction over it, and there has been an application to it of equitable principles which have no recognition in these latter courts. The effect of annuities has generally been examined in cases under the title of Satisfaction and the Collation of Goods.

Among the various considerations which form the inducement for the grant of annuities, one of great frequency is the satisfaction of existing rights or claims. It is a maxim in equity that the law presumes against double portions, which means that where the intention of the giver has not been clearly expressed, it is to be presumed that he intended that the second grant should operate as a satisfaction of an

(a) 7 Ves. 391.

(b) *Sibley v. Perry*, 7 Ves. 523.

existing right, rather than as the creation of a new and additional one. In furtherance of that presumed intent the courts of equity compel the party to elect which benefit to take, whether the original right or that which is given in satisfaction of it, because it is a principle of equity that he who would avail himself of any instrument must not disappoint the intent of the maker thereof; and that he would do, if he did not relinquish that benefit in satisfaction of which the new grant has been made. Hence if a man bind himself by covenant to settle an annuity on his wife by deed, and dies without making any such settlement, but bequeaths an annuity of the same amount to her in his will, it is clear that to allow her to claim her covenant and the bequest would be contrary to the intent of the testator, therefore a court of equity would require that she should choose one of the two, and be satisfied with that. (a) At the same time the actual intention of the grantor will control this legal presumption; and if it appear that a double gift or portion was certainly meant, the claim to both will be allowed. Hence have arisen the difficulties to ascertain what has been the intention of the grantor, and those difficulties have suggested certain principles which are found applicable to many cases. (b) The subject is one of considerable extent, and cannot be treated in this work so fully as may be requisite; but it is hoped that the following remarks may not be altogether useless.

To constitute a satisfaction the second grant must be exactly of the same nature as the former, and payable in the same manner, (c) and from the same fund.

Thus a rent charge would not be interpreted to be in satisfaction of the grant of a personal annuity, nor the converse. In *Atkinson v. Webb* (d) one granted by bond an

The two grants to be of the same nature, and payable in the same manner.

(a) See *Weyland v. Weyland*, 2 Atk. 633.

(b) See 1 B. C. C. 296; 1 Ves. J. 525; *Hinchliffe v. Hinchliffe*, 3 Ves. 516; *Sparkes v. Cator*, ib. 531.

(c) *Graham v. Graham*, 1 Ves. S. 262; *Heather v. Rider*, 1 Atk. 425; *Broughton v. Errington*, 7 B. P. C. 461, ed. To. But see *Brown v. Dawson*, 2 Vern. 498.

(d) *Prec. Ch.* 236; 2 Vern. 478.

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annuity of 20*l.* payable quarterly, free from all deductions, to A. and B. and the survivor. Afterwards she devised the same sum to A. to be paid half-yearly, charging it on land, and making it payable thereon. In her will she also devised several rent charges, and declared them to be in satisfaction of existing annuities, but made no such declaration in reference to this devise. It was held not to be a satisfaction, for it was not equally advantageous, being payable half-yearly instead of quarterly, on the land instead of generally, and was subject to the land tax, whereas the former was free from all deductions, while the testatrix had expressed her intentions where she meant to satisfy, and not to accumulate. And as the grant of an estate in fee was held not to be a satisfaction of a covenant to settle lands of greater annual value upon the grantor's wife for life, (a) so also the devise of a dwelling-house, land, and personal property, together with an annuity, was considered not to be a satisfaction of a covenant to leave a jointure equal to the annual value of both, and 50*l.* yearly to provide a residence, there being no other evidence of an intention to satisfy. (b) And where a testator bequeathed specific legacies of sums of money to certain legatees, and by a codicil bequeathed annuities of greater value to the same persons, these were held not a satisfaction of the legacies, not being *ejusdem generis*; and as the annuitants might die before any payments became due, the legatees might be prejudiced by the second grant. (c)

But where a man gave a bond on his marriage to settle an estate of inheritance in fee, of the clear yearly value of 100*l.* on himself and wife, with certain limitations, and afterwards settled a rent charge and a perpetual annuity according to the terms of his obligation, Sir Thos. Clarke, M. R. held this to be a performance of the condition. It was said that the rent was not so advantageous, because the wife could never get the fee, at most she could only get a

(a) *Eastwood v. Vincke*, 2 P. W. 614.

(b) *Richardson v. Elphiston*, 2 Ves. J. 463.

(c) *Masters v. Masters*, 1 P. W. 423.

base fee; he held, however, that it was more advantageous for her, not being subject to taxes, repairs, or loss of tenants; and as to the fee, it was never intended she should have it. On appeal to the Lord Chancellor the cause was compromised. (a)

The two grants must be equally certain, as well as of the same nature. Therefore where one bound by will, of which he was executor, to pay an annuity to his aunt, bequeathed by his own will one moiety of his residue to her, and the other to his mother, Lord Hardwicke held the bequest not to be a satisfaction. "The first," he observed, "is a clear annuity of 300*l.*, the will gives a moiety of the residue of the personal estate, whether more or less, which, though probably it would be more than sufficient, is uncertain, from accidents, if he lived longer after the will." (b) A husband covenanted that in case his wife survived him, she should have a life annuity of 200*l.* in lieu of all her claim on his personal estate. He became a member of a society who covenanted mutually that their widows should receive annuities from a joint fund. The Lord Chancellor decided that the payments from the society after the husband's death, were no satisfaction of his covenant. (c)

Neither will an annuity depending upon a contingency, or accompanied with a condition, be a satisfaction of an absolute right. This appears from *Crompton v. Sale*; (d) there a husband by will bequeathed certain annuities to his relatives, and made his wife his executrix. She by her will bequeathed annuities of the same amount, but of greater duration, to some of the same persons, contingent upon a survivorship. The Lord Chancellor said, there was no pretence for construing this a satisfaction. She had also enlarged two other of the annuities granted by her husband from mere lifehold interests to estates in fee, without any contingency. But these were considered altogether, and as

Must be equally certain.

A contingent grant will not satisfy an absolute right.

(a) *Middleton v. Pryor*, Amb. 391.

(b) *Barret v. Beckford*, 1 Ves. S. 520; *Billingsby v. A. G.*, 2 E. C. A. 570.

(c) *Rhodes v. Rhodes*, 1 Ves. J. 95.

(d) 2 P. W. 553; *Billingsby v. A. G.* 2 E. C. A. 570.

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it was held that the former were not given as a satisfaction, so it was decreed that there could not have been any different intention as to these, and that they were cumulative. In a subsequent case, (a) a man bound himself to pay his natural son 5000*l.* at twenty-one, and by his will he bequeathed 15,000*l.* to trustees to pay his son 200*l.* for his maintenance till he was twenty-five, and then to transfer the principal to him; if he married between twenty-two and twenty-five, and died, then to his issue; if he died unmarried before twenty-five, then it was to go over. This bequest was not a satisfaction, no sufficient evidence appeared to show any such intention on the part of the testator, and as it was said by Ashurst, J., one of the Lords Commissioners, "The legacy, not being payable till twenty-five, might have proved detrimental, for it is manifest that the bond depended upon the contingency of his attaining twenty-one, whereas the will extended it to the age of twenty-five."

A lesser grant is not a partial satisfaction of a prior right.

If there be a difference in the value of two annuities, which are given by separate instruments, the second, if of smaller amount, shall not be taken to be a partial satisfaction of the first, if of greater amount then indeed the lesser may be considered as satisfied, unless any of the above rules prevent such an interpretation. (b) Thus in *Graham v. Graham*, (c) one granted an annuity of 6*l.* to his daughter during her widowhood by bond, and on his death bequeathed her 10*l.* per annum, charged generally. Lord Hardwicke held, that as the former was only a debt on the grantor's estate, it was satisfied by the better annuity bequeathed in the will. "If, however," he says, "he had been chargeable with two, and had given an annuity equal to one, it would not have been considered as a satisfaction for either, but would have accumulated."

To satisfy rights due by the operation of law

These are rules which apply to the contracts and engagements of individuals, but rights which result by the opera-

(a) *Jeacock v. Falkner*, 1 B. C. C. 295; 1 Cox. C. 37.

(b) *Davison v. Goddard*, Gilb. E. R. 65.

(c) 1 Ves. S. 519.

tion of law, without their personal interference, will not be satisfied unless the party granting the subsequent right by express declaration, or by necessary implication, substitute the one for the other. Many cases elucidate this proposition, though they chiefly relate to widows. The law provides them, on the death of their husbands, with dower out of the real estate, or with a distributive share out of the personalty. Sometimes this provision is thought inconvenient by the heir or husband, and it is sought to be altered. It has already been noticed more than once, that by the common law, the heir might grant a rent to the widow in satisfaction of her right to dower, and if she accepted it, she should be barred from the latter. But the rent ought to have been charged upon the land of which she was dowable, because the law did not recognise a collateral charge to be a valid satisfaction, inasmuch as she could not distrain for the latter, by common right, as for the former. (a)

Where it was granted in bar of dower, the interest granted must have been equal to her interest in her dower. Thus a rent charge conditioned to cease if it fall into arrears, was held not to bar her dower, which is an absolute estate for life, and therefore where a tenant pleads to a writ of dower an assignment of a rent in satisfaction thereof, he must show in his plea that he has an estate in the land which will enable him to grant a rent equally extensive with the right to the dower. (b) At the same time, where a widow has elected to take a rent issuing out of lands, whereof she was dowable, in lieu of her dower, so long as that rent is paid her, she is bound by her act, and cannot claim her dower, though it may become questionable whether the grantor could grant the rent. Provided the estate granted to her extends during her own life, since, if granted for term of years, or for the grantor's life, it will not, as it seems, prevent her rejecting it. (c)

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there must be
an express de-
claration or ne-
cessary implica-
tion.

Satisfaction of
widow's dower.

By the assign-
ment of a rent.

(a) Dyer, 91.

(b) *Wentworth v. Wentworth*, 2 And. 30; Cro. E. 451.

(c) *Bickley v. Bickley*, 1 And. 287.

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The assignment of a collateral rent is not therefore a good legal satisfaction. But in an old case, where a man devised a rent charge to his widow in recompense of her dower, and in default of payment, that she should enter and have all the lands during her life, it was held that as she had claimed and recovered her dower she could not have the rent nor the forfeiture. (a) This was certainly the decision of a court of law, who treated the devise as a conditional devise, and held that the condition had not been fulfilled. But the cases are more frequent in courts of equity; and it is established that where certain benefits are offered to a widow, on condition of her surrendering or foregoing her existing rights, she shall be put to elect which claim she will enjoy. It is necessary, however, that such offer should be clearly expressed, and the intention to substitute the second benefit in lieu of the first must be declared with certainty, otherwise the gift will be held to be an accumulation and not a substitution.

Devise of annuities in satisfaction of dower.

It is not proposed to examine all the cases upon this subject; those only which refer to annuities will be brought forward, and of those only a brief abstract can be given. The great difficulty in the instances of bequests is to discover the testator's meaning, whether he intended to substitute the new benefit for the old one or not. In the earlier cases that intention was scrutinised more thoroughly than has been thought right by modern authorities, and they are not perhaps quite reconcilable. *Pitts v. Snowden* appears to be the earliest case, and there is no direct report of it, but it is cited in *Villa Real v. Lord Galway*, (b) a case on the same subject. However, according to the statement there given, a man devised to his wife an annuity of 50*l.* payable out of his land, with a clause of entry and distress, to be made good out of his personalty, and subject to this annuity gave his freeholds to his children. Lord Hardwicke held that the widow was entitled to both the

(a) *Geslin & Warburton's C.*, 1 *Leo.* 137; *Cro. E.* 128.

(b) 1 *B. C. C.* 292. n.

annuity and her dower, though the grounds of his decision are not preserved. Then came *Arnold v. Kempstead*, (a) where a testator gave to his widow certain leaseholds for her life, and an annuity of 10*l.* to be paid out of the rents and profits of his freeholds, but did not add a clause of entry and distress, and gave his freeholds to his son. Lord Northington decided that the manifest intention of the testator was to give the annuity in satisfaction of the dower, and that she was entitled to one only. In *Villa Real v. Lord Galway*, (b) the husband bequeathed an annuity of 200*l.* to his wife, and charged all his property, personal as well as real, with the payment, and granted a clause of entry and distress. Lord Camden held that the claim of dower disappointed the will, and was inconsistent with it, and that the widow was bound to elect. So in a subsequent case of *Jones v. Collier*, (c) Sir T. Sewell, M. R., held the widow to her election on the construction of the whole devise. And lastly, in *Wake v. Wake*, (d) a husband devised his freehold estates, valued at 240*l.* per annum to his son, and charged them with an annuity of 35*l.* to his widow, and gave her a legacy of 100*l.* in addition. Mr. J. Buller held this to be a satisfaction of the dower, on the authority of the cases. The report is very brief, and certainly the substituted annuity is so disproportionate in point of value with the original right, that the case is not very reconcilable with the principle expressed in page 278, where the gifts are of different amounts.

In all these cases the object has been to discover an intention to substitute, and slight circumstances were relied on; but Lord Thurlow began to examine the matter more strictly, and the result of a case before him, followed by the important decision in *French v. Davies*, before Lord Alvanley, is that the widow must be expressly deprived of her dower, otherwise the second grant shall not be considered as substituted, but as cumulative. It would be

(a) Amb. 466; 2 Eden, 236.

(b) Amb. 682; 1 B. C. C. 292. n.

(c) Amb. 730.

(d) 2 B. C. C. 255.

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right, however, to refer to *Pearson v. Pearson*, (a) where Lord Rosslyn intimated an opinion in favour of an altered rule of construction.

There a testator devised land to his son, subject to a rent charge of 10*l.* to his wife, and 5*l.* to his brother. The widow filed a bill for the annuity and her dower, and the question raised was, whether the dower was barred by the rent charge. Lord Rosslyn observed, "The law is perfectly settled, and very plain; the gift of an annuity to the wife may be a bar or not, according to the language of the will; *Arnold v. Kempstead*. In *Villa Real v. Lord Galway* it was held to be a bar, because otherwise the other devises in the will could not take effect. In this case, if the value of the lands should not be sufficient to satisfy the two annuities and the dower, it would prove that it was intended to be in bar, otherwise there is nothing to show such intention, and there must be such intent to make it a bar to dower."

Next came the case of *Foster v. Cook*, (b) where Lord Thurlow expressed a strong opinion as to the widow's right to the two benefits unless the one he expressly excluded. There the testator devised all his estates, personal and real, to trustees, on trust to pay his wife an annuity of 50*l.* during widowhood; and in case she married again, then of 30*l.* only. He gave all his property, charged with this annuity, to his child. The widow having claimed her dower as well as the annuity, Lord Thurlow decreed that she was entitled to both. "The wife," he said, "has a charge upon the estate paramount to the will, she has an absolute right to the third part, it is not his to deprive her of it. But here it is to be gathered from circumstances that she is not to have it, and because he gives all his property to trustees, I am to gather, from his having given all he *has*, that he has given that which he *had not*. So far from a declaration plain, I have nothing even to lead me to think he meant to deprive her of dower. She must, therefore, have her dower."

(a) 1 B. C. C. 293.

(b) 3 B. C. C. 347.

In *Middleton v. Carter*, (a) the widow was held entitled to dower, where a mixed fund was bequeathed to trustees, to pay the testator's wife an annuity, and for other purposes, but no notice whatever was taken of her dower.

This case was followed by *French v. Davies*, (b) where the whole of the previous decisions were reviewed at great length. The facts were complicated, but may be stated briefly thus: A testator devised his real estate to his executors to be sold, together or in parcels, and the produce to go into his personalty; and bequeathed an annuity to his widow out of the whole of his personalty when increased with the produce of the sale; and after other provisions appointed his widow executrix of his will. The real estate having been sold with her consent, she claimed the value of her dower out of the purchase money, as well as her annuity, and Lord Alvanly in a most elaborate judgment, held her entitled, on the ground that she was not expressly excluded from her dower. "It is not enough," he says, "to contend that he did not intend it, for she does not want his intention in her favour, but it is necessary to prove that he meant to exclude her." And, again, "Suppose he did not know that she was dowable, that will not do. It must appear that he did know it, and meant to bar her, or what she demands is repugnant to the disposition." In *Strahan v. Sutton*, (c) where the same rule prevailed, it was argued that the widow's claim for dower was inconsistent with the will, because the testator had devised the house to trustees, and had directed that it should not be let to certain persons whom he named, but the Master of the Rolls held it extravagant to suppose that that could interfere with her right. Again, in *Greator v. Cary* (d) the bequest was 150*l.* a year to the widow, during widowhood, which the executors were ordered to pay out of the real and personal estates, and the personalty was directed to be placed out at interest to assist the real estate in the payment of the annuity. The testator bequeathed his

(a) 4 B. C. C. 409.

(b) 2 Ves. J. 572.

(c) 3 Ves. 249.

(d) 6 Ves. 615.

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household furniture to his widow, and he devised the residuary personal and real estate to his sister, if his widow died childless. The widow was held entitled to the annuity and her dower.

In addition to these must be cited the late case of *Miall v. Brain*, (a) where the decision was, however, against the widow, still the general principle was admitted, and she was excluded from her dower because her enjoyment of it would have been repugnant to the dispositions of the will. The testator devised all his estates to trustees, and directed them to permit his daughter to use, occupy, and enjoy a certain dwelling-house, which would have been vain unless they had such an estate as could enable them to secure the enjoyment. But the devise to them was general, and as the devise of the house was inconsistent with the right of dower, so it followed that the devise of the whole estate was equally exclusive of that right.

In one case there was a partial expression of the testators intention to substitute, but not a total declaration, yet his intention was held to extend farther than he had expressed it. It was *Boynton v. Boynton*. (b) The testator gave by his will 1000*l.* per annum to his wife in lieu of dower, but if she married again he gave her 100*l.* a year in lieu of all benefits from his estate. She did marry again, and claiming her dower was held not entitled to her annuity. This was, however, before the change in the construction of these bequests which has since prevailed.

As to settlements.

If the construction of wills, in which favour is more generally shown, have been thus strict upon this point, a similar mode of interpretation can easily be expected in instruments between parties. Accordingly, where a man in his marriage settlement covenanted to settle an annuity on his wife, as a provision in case she survived him, it was held, that her dower and her share under the statute of distributions were not satisfied by the settlement. (c) It is

(a) 4 Madd. 119. See *Butcher v. Kemp*, 5 Madd. 61.

(b) 1 B. C. C. 445.

(c) *Couch v. Stratton*, 4 Ves. 391.

customary to insert a clause in the deeds providing that such shall be the effect of the settlement.

On a consideration of all these cases the principle already expressed seems to be fully supported. That the intention of the testator, when it appears either in direct language or from clear and necessary implication, for a substitution in the place of the existing rights, shall prevail against them, but there only; and in the case of widows, one of the strongest, if not the sole, circumstance which raises this implication, is the repugnancy or inconsistency of the claim of dower with the provisions of the will.

Hitherto the sole act of the husband has been referred to as creating the satisfaction, it must also be recollected that the wife herself can, by a prenuptial agreement, give up her right to her dower and distributive share in consideration of a different settlement. This arises from the statute, 27 Hen. VIII. c. 10, which makes a wife's jointure before marriage a bar to her right of dower. It was doubted whether an infant could, by a prenuptial settlement, deprive herself of that right, but in the case of *Duchess of Buckingham v. Lady Drury* (a) it was decided by the House of Lords, overruling the decree of Lord Northington, that where an infant had, before her marriage, agreed to accept an annuity on the death of her intended husband, in satisfaction of her dower and right to the distributive share of his personal estate, she was bound thereby and had no right to elect, although there was only the personal covenant of the husband not secured on any land. At common law this could not have operated as a satisfaction.

Thus far of the cases of widows and their rights; other legal claims may be the subjects of similar satisfaction, though the cases are not now common. Upon the same equitable principle which requires a party to fulfil all the provisions of an instrument, from which he is willing to derive an advantage, when a will contains a disposition in favour of a person inconsistent with any existing right

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Result of the
above cases.

Wife may bar
by her jointure
or settlement.

Other legal
claims may be
satisfied.

(a) 3 B. P. C. 277, ed. To.

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already vested in him, the courts of equity compel him to elect one. (a) Thus where a party, tenant in tail of a rent charge, was made devisee of the land charged in strict settlement, it was determined that he must elect to take under the settlement or under the will, as he could not have both.

The intention of the testator to the contrary, if clearly apparent, will however prevent the substitution and accumulate the gifts. "Suppose a child," says Lord Hardwicke (b) "is entitled to a rent charge out of a real estate belonging to his father, who makes a provision for him by legacy or portion, and devises that real estate to another child, without taking notice of the rent charge, that child is entitled thereto, *as the father did not show any intent to exclude it, for that,*" he adds, "*did not defeat the devise, which the court will not suffer.*"

Devise of annuity to testator's debtor.

It was held in a case before the Court of Exchequer in Ireland, (c) that the devise of an annuity to the testator's debtor was a discharge of the debt, because this latter could not be set off against the payments of the annuity.

When the election is to be made.

When it is clear that one of two benefits is intended as a satisfaction of the other, and the party is bound to elect one of them, such election cannot be required until there has been sufficient time and opportunity for a complete knowledge of the values and circumstances of the respective rights or benefits. (d) The mere enjoyment of either does not preclude a fresh choice, if made within a reasonable time after the right of election has devolved upon the party. Thus an heir at law, who was bound to elect between an estate and an annuity, was held not to be precluded from his election by receiving half a year's payment of the annuity while he was abroad; (e) and in one case, (f) Mr.

(a) *Blake v. Bunbury*, 1 Ves. jun. 514; 4 B. C. C. 21; see *Finch v. Finch*, *ib.*; *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516.

(b) In *Ayres v. Willis*, 1 Ves. sen. 230.

(c) *Gould v. Adams*, Vern. & Ser. 258.

(d) *Wake v. Wake*, 3 B. C. C. 235; 1 Ves. jun. 335; *Pigott v. Bayley* M'Cle. & Yo. 576.

(e) *Rumbold v. Rumbold*, 3 Ves. 65.

(f) *Wake v. Wake*, *cit. ab.*

J. Buller allowed a widow to make her election between her dower and an annuity granted by her husband's will, though she had received the latter for three years. But where a widow proved her husband's will, acted under it, and received the rents and profits for six years according to its directions, it was held that she had made her election, and could not claim her rights under a previous settlement, which were held to be satisfied by the will. (a) The election indeed, if not distinctly made, may be presumed from the conduct of the party, and is therefore a question of intention depending upon the circumstances of each case. At the same time the acts of the party, if in law or in equity they amount to an election, will operate against the presumed intent of the party. As where the acceptance of an estate was to be accompanied with the release of an annuity, the party having, in the opinion of the court, accepted the estate, was held bound to execute the release, though it appeared that he had not intended to do so. (b) It will be right to bear in remembrance that the party must be fully acquainted with the respective rights and benefits, and in drawing the presumption of an election from acts done, they must be such as to raise a fair implication that the party had a knowledge of the inconsistent rights, and an intention to elect between them. (c)

Where an election is thrown upon a married woman, she is not precluded by her husband's act, but may make her choice after his death, or if she be called upon to elect in his life-time, the court will direct an inquiry as to the comparative values of the two interests, if there be any uncertainty in this respect, but not otherwise. (d)

Such is the brief abstract of some of the rules and authorities governing the law of satisfaction and election, which is submitted to the reader in connection with the law of annuities. There is still one case (e) which must be

(a) *Butricke v. Broadhurst*, 3 B. C. C. 88; 1 Ves. jun. 171.

(b) *Earl of Northumberland v. Earl of Aylesford*, Amb. 540, 667.

(c) *Dillon v. Parker*, 1 Swa. 359, and the learned reporter's elaborate note thereon.

(d) *Wilson v. Lord J. Townsend*, 2 Ves. jun. 693.

(e) *Mascal v. Mascal*, 1 Ves. sen. 323.

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The grant may be in corroboration of a previous agreement and not in satisfaction.

Effect of an annuity in the collation of goods.

noticed, as it affords another view in which the effect of an annuity may be considered with reference to other rights. There the second grant was allowed to operate as the completion of a former settlement, and thereby not in satisfaction, but in corroboration of the precedent agreement, in which case only one annuity was established. The facts were shortly these. On an intended marriage, A. agreed to settle 100*l.* per annum on his wife; falling sick, he devised 100*l.* per annum to her before his marriage. He then recovered, executed the agreement and married. Baron Clarke held, that she could only claim one annuity upon the principle mentioned.

The other instance of the effect of an annuity is seen in the Collation of goods under the Statute of Distribution, in which it is provided, that when any child has received any advancement from his parent during his life, that shall be brought into the account, and shall be estimated in the settling of the value of the distributive share. It has been stated that an annuity or rent charge settled by a parent on his child is to be considered as an advancement within this act, whether it commence before the parent's death or not till after. (a)

There is some difficulty in computing the value, but the following rules were laid down by Lord Eldon in the case of *Lord Kirkcudbright v. Lady Kirkcudbright*. If it be an absolute continuing annuity, its value, computed at the time of the grant, should be taken. If a contingent annuity, still its value, though not easily ascertainable, or probably the aggregate amount of the payments, should be taken. If the annuity has ceased, the grantee may have his option either to bring the value, calculated at the time of the grant, or the amount of the payments actually made, into collation.

(a) *Edwards v. Freeman*, 2 P. W. 441; *Morris v. Burroughs*, 1 Atk. 404; *Lord Kirkcudbright v. Lady Kirkcudbright*, 8 Ves. 51.

CHAPTER VIII.

OF THE DETERMINATION OF THE ANNUITY.

It must now be considered how an annuity may be terminated; and it will be found, that, according to the nature of the transaction, many ways will lead to such a result. They may be thus enumerated:

1. Effluxion of Time.
2. Determination of the Fund charged.
3. Consolidation.
4. Release or Surrender.
5. Redemption.
6. Bankruptcy and Insolvency.
7. Revocation.
8. Breach or Performance of Conditions.

Of these in their order, and first, of the Effluxion of Time. Annuity determined By effluxion of time. Where an annuity has been granted for a definite period of time, it ceases on the expiration of that period. If it have been granted to one in fee, and there be a failure of heirs to the grantee, it may be presumed, that, in default of any disposition of it by the last holder, it would cease. How far a grantee can bequeath an annuity which is granted in fee, so as to confer a right thereto which shall continue after a failure of the grantee's heirs, may be a question of doubt, when it comes to be examined in a court of law.

Where an annuity is granted in any particular course of descent, it ceases on failure of the heirs in that line, as was shown in *Turner v. Turner*. (a) There one N. T. devised an annuity of 300*l.* to his wife for life, then to accumulate to make portions for his daughters one after another, then to remain to his eldest son, and, on his decease, to the

(a) 1 B. C. C. 316; Amb. 776. See *Hack v. Tuck*, 3 Swa. 270.

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heirs male of his body, and in default of issue male, to remain to his next eldest son, and gave the rest of his estate among all his children. He had five sons and five daughters. The latter all married in the lifetime of the widow, and the three eldest sons and the youngest died without issue before her. On her death the fourth son claimed the annuity as *remaining* to him. The devisees of the eldest son claimed it as part of his estate; and the executors of the original testator claimed it as part of the residue of his estate. The lords commissioners held that it was not personal estate which vested absolutely in the eldest son, being analagous to an estate tail in land, neither did it vest as an executory devise in the fourth son who survived, but that it was an annuity, which, being exhausted by the events, could not be taken by any one as such, and therefore it sunk into the residuary estate of the original testator.

Rent does not
escheat on
failure of heirs.

In regard to a rent, as that is a species of realty, it might have been thought that on failure of heirs it would escheat, but that is not the case. Brooke, in his Abridgment, tit. Extinguishment, (a) lays it down from 27 Hen. VIII. 10, that if a rent be granted to one and his heirs, or to a corporation, the rent will be extinguished if the grantee die without heir, or the corporation be dissolved, and shall not escheat to the crown. A rent cannot escheat to the lord for want of heirs, because it is not holden of the lord.

So also where a corporation is chargeable with a personal annuity, it ceases if the corporation be dissolved, but a real annuity would still remain a charge upon the lands of the corporation. It seems that a charge on a parsonage is not a mere personal charge, the parson being only liable in respect of the land. (b)

Grantee cannot
enlarge his
estate in the
rent.

It is to be observed that the grantee cannot enlarge his estate in the rent beyond the terms of the grant; and therefore a grantee in tail of a rent cannot, by suffering a recovery, convert it into a fee, so as to carry it to his heirs

(a) And also in Corodie, 5, Escheat, 9. Com. Dig. Escheat, (A. 1). A. G. v. Sands, Hard. 496.

(b) Bishop of Rochester's case, Owen, 732; And. 106.

general on failure of the limitation. (a) He will only gain a base fee, determinable on failure of the issue inheritable under the estate tail. But if remainders over be limited after and expectant on the estate tail, they will be barred, and the recovery will confer an ownership coextensive with these estates. (b)

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When an annuity is granted during the continuance of a life or lives, it determines when the annuitant dies. But as an annuity is the grant of a sum of money payable at certain appointed times, although the annuitant generally dies in the interval between the times of payment, yet the law does not make any apportionment between the part of the period elapsed and that which is unexpired, but limits the payment to the last period completed before the death of the annuitant. (c) This proceeds upon the interpretation of the contract by which the grantor binds himself to pay a certain sum at fixed days during the life of the annuitant; when the latter dies, such day not having arrived, the former is discharged from his obligation, and such has been the construction of this rule of law, that, where an annuity was payable at Michaelmas and Lady Day, or within thirty days after each feast, and the grantee died within the thirty days, it was held that the payment due at the feast before her death was discharged. (d)

As to annuities on lives there is no apportionment.

Hence, in most grants of annuities, it is now customary to insert a covenant expressly to secure to the grantee a rateable portion of the annuity, according to the period which may elapse between the last day of payment and the death of the annuitant.

To this rule, however, there is an exception where the annuity is granted for the maintenance of the grantee, which, as Mr. Swanston observes, (e) is supported by the necessity of the case, and the consequent presumption of

Except it be granted for maintenance.

(a) *Chaplin v. Chaplin*, 3 P. W. 230.

(b) 3 Pres. Abs. 137, Co. L. 298 a, Butl. n. *Weeks v. Peach*, 2 Lutw. 1224.

(c) 3 Atk. 261. *Franks v. Noble*, 12 Ves. 484.

(d) *Price v. Williams*, Cro. E. 380.

(e) In note to *Ex parte Smyth*, 1 Swa. 339.

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intention. It is thought equitable, that, to meet the expenses of maintenance in the full extent to which they have been incurred, the current annuity should be apportioned. Upon this principle the Court of Common Pleas acted in a case of *Howell v. Hanforth*, (a) where they held the defendant under terms; for as an annuity had been granted for the maintenance of a married woman separated from her husband, the court compelled the latter to pay a sum proportionate to the time elapsed before her death. The practice in the courts of equity was there referred to, and may be found in several authorities, especially in *Hay v. Palmer*, (b) where the grantee was an infant, to whom maintenance was payable till eighteen or marriage, half-yearly at Lady-day and Michaelmas. She reached her eighteenth year on the 16th of August, and was decreed to have her maintenance rateably from the last Lady-day.

It need not be expressly stated that the annuity is for maintenance; if that must be reasonably understood from the grant, the annuity will be apportioned. (c)

This exception does not hold where no maintenance is required.

It may be well to refer to the observation of Lord Chief Justice De Grey in *Howell v. Hanforth*, where he says, "It appears that the quarterly payments were not originally forward payments, by way of maintenance for the ensuing quarter, which might make a difference, but payable at the end of each quarter, in order to discharge the expenses incurred in the three preceding months." For where there is no apparent necessity for the continuance of the maintenance, there will be no apportionment, as was held by Lord Redesdale in *Anderson v. Dwyer*, (d) where an annuity was bequeathed to a married woman for her sole use, "It differed," he observed, "from the case of a separate maintenance for a wife or children;" and accordingly he refused an apportionment.

There is also a case, (e) where an annuity charged on a real estate in aid of the personalty, had been ordered to be

(a) 2 W. Bl. 1016.

(b) 2 P. W. 501.

(c) *Reynish v. Martin*, 3 Atk. 331.

(d) 1 Sch. & L. 301.

(e) *Webb v. Lord Shaftesbury*, 11 Ves. 361.

paid out of a fund in Court, half-yearly, at Midsummer and Christmas. The annuitant having died between Lady-day and Midsummer, the Lord Chancellor, after some consideration, made an order for her representative to have payment of the quarter to Lady-day. Here it was a regulation of the Court which had fixed the intervals of payment, and did not emanate from the grantor himself.

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It must not be supposed from this case that the Court will alter the mode of payment, when any such is appointed by the grantor, because the contrary has been expressly ruled in a case (a) where an annuity of 100*l.* per annum was bequeathed by will, and on an application to the Lord Chancellor to order it to be paid quarterly, he refused, saying, he would not alter the payment, as it was in the will.

The Court will
not alter the
mode of pay-
ment.

It may happen, and indeed has, that the annuitant should die on the day of payment; in such a case it seems that the annuity would still be payable. It is true that rent is not due till midnight, though demandable at sunset, and as between the tenant for life and the remainder-man, if the former die before midnight, the latter, at common law, was entitled to the rent which falls due on that day. Here, however, the rent of the period is not lost, but is payable to some person or other, the discussion is, to whom? whereas the annuity would be wholly lost if the death on the day of payment were held to affect it. This is also the construction of a grant or covenant, in which it is to be determined whether the sum is to be paid at the beginning or at the end of the specified day; and the rule of law, which construes the words of a covenantor most strongly against him, is fairly applicable here.

Where the
annuitant dies
on the day of
payment.

Accordingly, in *Southern v. Bellasis*, (b) an annuity appears to have been payable yearly on Michaelmas-day, and the grantee, who was also the annuitant, died at nine o'clock in the evening of that day; it was held, that as she lived beyond sunset, when the rent on which it was secured

(a) *Hawley v. Cutts*, 2 Freem. 24.

(b) 1 P. W. 179, u.

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was payable, her administrator was entitled to the arrears. This case was cited with approbation by Lord Macclesfield in *Earl of Strafford v. Lady Wentworth*. (a)

In the case where the annuity continues beyond the grantee's life, it seems there is no apportionment, but the whole portion due at the next period after the grantee's decease goes to the person next entitled, and no part is reserved to the former's estate. (b)

Rent continues during the life of cestui que use.

Where a rent is granted to one for the use of another, the Statute of Uses vests the possession of the rent in the latter; therefore it will continue during the life of the person entitled to the beneficial interest, and does not depend upon the life of the trustee.

Thus, a rent to A. and B. and the survivor of them, for the use of C. during her life, was held to continue after the deaths of A. and B., C. not being dead. (c)

By determination of the fund charged.

Secondly, where an annuity or rent is charged upon a particular fund, and not generally, it ceases upon the termination of the grantor's interest therein, if at the time of the grant he had no power to charge it in the hands of his successor. For such a grant in actual effect seems to be a conditional or contingent grant; as it is a grant of a rent or annuity so long as such a fund shall continue. The distinction between the assignment of a fund in part or entirely, and the charge of an annuity on that fund, has been considered above, (d) but here it is assumed that the grant operates as the latter.

Thus, a rent charge granted by a tenant in tail in possession ceases on his death, or by a lessee for years on the expiration of his term. So, where one entitled to the dividends on certain stock for life charges an annuity thereon, this ceases on his death. Also, where two acres of land descended to two coparceners, one of whom before partition granted a rent charged upon one of the acres, which

(a) 1 P. W. 180.

(b) *Wilson v. Harman*, 2 Ves. S. 672.

(c) *Crawley's Case*, Cro. E. 721; *Owen*, 126; 2 And. 130.

(d) Page 7.

was afterwards assigned to the other parcener, this rent was held to fail on that assignment; (a) but if partition be not made, and the land charged descend to the other parcener, he takes it subject to the rent, because he claims by descent, and the charge is prior to the accruing of his title. (b) In the case of joint-tenants, if one grant a rent, and die before severance, the charge will fail as against the survivor, because he does not claim through his companion, but from the original title. (c)

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Again: if the feoffee of an estate upon condition grant a rent charge thereout, and the condition be broken, the feoffor on entry may hold the land discharged. (b) So if a bishop grant a rent as a charge on his episcopal possessions, it will determine on his death or translation. (d)

Hence, where a man agreed to pay an annuity out of his salary, as a searcher in the customs, and then covenanted generally to pay it, it was held, that the agreement so recited controlled the covenant, and that on his dismissal from the office the annuity ceased to be payable. (e)

The above proposition must, however, be qualified by this consideration, that the annuity or rent must by the terms of the grant be charged upon the particular fund only. Because, if it be charged generally, though primarily on one fund, it will not cease on the failure of that, but will attach upon the other property of the grantor. As if lessee for years grant a rent charge in fee, it ceases as a rent on the expiration of the term, but it may operate afterwards as an annuity, and may as such bind the grantor and his heirs. (f) So, also, the grant of an annuity by a bishop, though it cannot charge his successor, may operate to bind himself after translation, or his executor after his death. (g)

Provided the
annuity be
charged on that
one fund only.

Again: if the grantor's estate become enlarged subsequently to the grant, the interest conveyed by him shall be

So if grantor's
estate become
enlarged.

(a) Anon. Moore, 95.

(b) Lit. s. 286.

(c) Ib.

(d) Perk. Conditions, s. 840; Lit. s. 358.

(e) Hesse v. Albert, 3 M. & R. 181.

(f) Poph. 87.

(g) Dr. Dale's Case, Dyer, 370, b.

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continued to the extent granted, although it exceed what he had originally power to grant. As in the case stated by Littleton, (a) where a man is disseised of land, and the disseisor grants a rent charge thereout, although the disseisee doth afterwards release the land to the disseisor, yet the rent charge shall remain in force, because he shall not have advantage by the release against his own grant. And if a tenant in tail grant a rent in fee, though it is determinable on his death, yet if he levy a fine, or suffer a recovery, by which the estate tail is converted into a fee simple, the rent is not avoidable. (b) So, where tenant for life, with remainder to his son in tail, remainder to himself in fee, granted a rent charge in fee, and the father and son levied a fine to the use of the father in fee, it was held, that the rent charge in fee was valid, for the father's estate was sufficient to pass the grant, and although the son might have avoided it, yet by the fine he had deprived himself of the means. (c)

And similar to this is the case stated in 6 Co. 79, to be good law:—That if two joint-tenants be in fee, and one grants a rent charge in fee, and afterwards releases the other, in that case, although to some intent, he to whom the release is made is in by the first feoffor, and no degree is made betwixt them, yet as to the grantee of the rent charge, he is under the joint-tenant who released, and he who survives shall not avoid it after the death of him who released; for he who survives, by acceptance of the release, has deprived himself of the ways and means to avoid the charge, for *jus accrescendi*, i. e. the right of survivorship, was the sole means to have avoided it, and that is utterly taken away by the release.

So if it be granted for the benefit of the estate.

But when the rent charge has been granted for the benefit of the estate, the party entitled after the grantor will be restrained from avoiding it, at least if he will avail himself

(a) Sec. 477.

(b) Case of Alton Woods, 1 Co. 48, a. Benson v. Hudson, 1 Mod. 108; 2 Lev. 26.

(c) Holt v. Sambach, Hutt. 96; Cro. C. 103.

of that benefit. (a) As if a tenant in tail of an estate under a defeazible title grant a rent charge in fee for a release of the right to the defeazance, the issue in tail shall not avoid this rent, because they are benefited by the release. So if he grant a rent to the widow entitled to dower out of the land in satisfaction thereof, the issue in tail will be bound. (b)

In other cases it is at the election of the issue in tail whether he will vacate the rent granted by his ancestor. For the latter may bind him to warranty, and that may be a bar to his proceeding to annul the grant. (c) But as the grant of the rent is void against the issue in tail, and not voidable only, it will not be strengthened by the heir paying the rent after the grantor's decease. He may still defeat the charge. (d)

The effect of a confirmation of the grant by the party entitled to the estate at the time it was executed or in succession, was considered above in Chap. II. But a grant intended to operate in future may sometimes be defeated by the act of the party who has the present interest in the land, as in Capel's case. (e) There an estate was limited to one in tail, remainder to another in fee. The remainderman granted a rent charge in fee. The tenant in possession then suffered a recovery to the use of a stranger, and died without issue; and it was held that the rent charge failed. Because it could not attach on the lands till the remainderman came into possession, and as his right to the estate was barred, and the land never came to him, so in like manner his charge had nothing to be executed upon, and as he could not falsify the recovery, the grantee who claimed through him could have no greater power.

Thus also where A. covenanted to levy a fine to the use of himself and the heirs male of his body, remainder in tail to several others, remainder to his own right heirs; provided that if there should be a failure of issue male of his

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A future grant may sometimes be confirmed or defeated by the act of the tenant of the land in possession.

(a) Octavian Lumbard's C. 44 Ed. III. 21; cit Plow. C. 436, 466; 1 Co. 94 b; Co. L. 343; 10 Co. 37 b.; 1 Roll. Abr. 842.

(b) Bickley v. Bickley, 1 And. 287.

(c) Winch. 5. cited by Holt, C. J. in Machel v. Clarke, 2 L. Ray. 780.

(d) Roll's Abr. Estate, F. a.

(e) 1 Co. 62; Hunt v. Gateley, 1 And. 282; Pop. 5; Moore, 154.

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body, and B. his daughter be married, or of age, then she should have 200*l.* a year for ten years. A. died, leaving issue male, who entered, made a lease for 1000 years, levied a fine, and suffered a recovery, and then died without issue, leaving B. married and of age. The annuity was held to be barred by the recovery, since the remainder out of which it was to issue was barred. (a)

In the case above referred to in Littleton, (b) that author goes on to state, that if the disseissee enter and then enfeof the disseisor, the rent will be avoided. Here, however, a new estate is conferred upon the grantor, which he has not charged.

There is one instance in which it seems at first that the grantor may confer an interest beyond his own, but on consideration it will be seen that that is not really the case. It is when a rent in fee is granted by a tenant in tail under a power or condition to grant such an estate. It is holden that where the owner of the fee devises to one an estate tail on condition that he shall grant a rent in fee to a particular person, the rent shall enure in fee, though the actual grantor had only an estate tail in the land. (c) But it is evident that the real grantor of the rent in this case is the devisor, and it is granted out of his estate through the agency only of the tenant in tail.

The rule as to the appropriation of a particular fund which fails.

Where there is a mere general charge, and the grantee assents to the appropriation of some particular fund for the payment of the annuity, the failure thereof, whether partial or total, would probably be at his risk. Yet where the Court of Chancery itself appropriates a fund, the grantee is not precluded thereby, but still retains a lien upon the whole. Thus where a testator directed an annuity to be paid out of his personal estate, a sum of 5 per cent. stock was, in the course of a cause, ordered to be set apart to answer that annuity. This fund having become insufficient by the conversion of the 5 per cents. into 4 per cents., the deficiency was directed by the Vice Chancellor to be sup-

(a) *Benson v. Hudson*, 1 Mod. 108 ; 2 Lev. 26 ; 3 Keb. 274. 287. 292.

(b) Sect. 477.

(c) *Dutton v. Ingram*, Cro. J. 427 ; *Gouldwell's C.* Pop. 131 ; Roll Abr. 842.

plied out of another fund, to which other persons interested in the residue had been declared to be entitled, the appropriation of the first fund not having been the act of the grantee. (a)

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Neither can an executor or trustee affect the right of the grantee by any appropriation of the fund, as appears from the two cases of *Gordon v. Bowen* and *May v. Bennett*. In the former (b) a testator bequeathed an annuity of 1500*l.* to his widow for her life, charging all his property with the payment. His executors invested money in East India Company's bonds at Calcutta, where they resided, which produced 8 per cent. interest, but were payable on sixty days' notice, and the Company reduced the interest to 6 per cent. The Vice Chancellor held that the grantee was not to suffer from this alteration, the investment not being made in a permanent fund.

And in the latter, (c) a testator directed his executors to lay out in what government securities they pleased as much money as would produce a certain annual interest for his wife's use during her life. The executors invested in the 5 per cents. a sum which yielded dividends equal to the sum mentioned. These were afterwards diminished by the conversion of the stock, and the Master of the Rolls ordered that the deficiency should be made up to the grantee out of the general estate.

In neither of these cases was there any proof of renunciation by the grantee of the general lien on the grantor's whole estate.

The last case on this point was *Kendall v. Russell*, (d) but there the Vice Chancellor was of opinion that the appropriation made by the executors was in conformity with the intention of the testator, and therefore, as the bequest was to be considered as a gift of the interest on the particular stock, the legatee was to suffer the loss caused by the reduction of the interest.

(a) *Davies v. Wattier*, 1 S. & S. 463.

(b) *Gordon v. Bowen*, 6 Madd. 342.

(c) *May v. Bennett*, 1 Russ. 370.

(d) 3 Sim. 425.

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Grantor cannot
determine the
estate charged.

Of course the grantor cannot by any act of his own determine his estate so as to affect the annuity charged upon it, as in the cases suggested by Lord Holt in *Cage v. Acton* (a) of a tenant for life granting a rent charge and then surrendering to the reversioner; and of a man having a rent in fee, acknowledging a statute, and then releasing to the tenant of the land; "The estate for life," he says, "will continue as to the grantee of the rent, and the rent to the conusee." An early case may be mentioned here. One Holborrow was the lessee of a manor under Dr. Drury, and bound himself to pay an annuity to one A. G. for seventeen years, if A. G. so long lived; and so long as Holborrow, or any one claiming by or under him, should or might occupy or enjoy the said manor. And then he surrendered his lease to the obligee. It was held that he was still liable to pay the annuity, for the obligee came in under him, and he was himself the cause of the nonenjoyment. (b)

Neither can a tenant in tail, by suffering a recovery, and thereby converting his estate into a fee simple, destroy a rent which he had previously granted. (c)

And it seems that if the grantor do an act to secure the annuity, which creates a forfeiture of the estate on which it is secured, and the party entitled to avail himself of that forfeiture be privy and assenting thereto, he cannot avail himself of it so as to defeat the annuity. (d)

At the same time if the grantee participate in the act, as in the cases which will be shortly discussed of consolidation, the annuity will be determined. Thus also a case (e) is reported in 4 Leo. 2, where a lessee for term of years granted a rent to his lessor for the term, the latter granted the reversion in fee to the former. And per Cur. "The rent was gone, because the lessor who had it was

(a) 1 Ld. Ray. 520. See also Co. L. 338, b; Duncomb's C. 4 Leo. 239; and Thurston de Holland's C. cited in 8 Co. 145.

(b) Dr. Foord v. Holborrow, Owen, 104; Cro. El. 313; Pop. 39.

(c) White v. West, Cro. El. 793.

(d) Clifton v. Gresley, 3 Keb. 306.

(e) Buckhurst's Case, S. C. Godb. 137.

party to the destruction of the lease, which is the ground of the rent."

Here it may be noticed that as annuities are very frequently purchased, not on the security of the grantor alone, but with the guarantee of others as sureties for the due payment, the grantee must be cautious in his conduct towards the principal grantor, and not by his own act release the surety. Since it has been decided that if the annuity creditor, without the assent of the surety, give time to the principal for payment, the surety is thereby discharged. (a) And this discharge extends not merely to the arrears due when the time is given, but also to subsequently accruing payments. In truth the surety's obligation is wholly dissolved. (b)

So where there are several securities for the annuity, and any one through the neglect of the grantee is lost, the surety is to that extent discharged. As where the annuity was secured among other things by the assignment of two ships, and the assignee having omitted the regulations required by the registry act, the grantor sold them, it was held that the surety in redeeming under a clause of redemption might deduct the value of these ships. (c)

Where it does not appear by the terms of the instrument itself that one of the parties is only a surety for the other, but his covenant for due payment is absolute, he cannot in a court of law object that the principal has been discharged by the grantee, or that some fund has not been previously applied to, which was a primary security. (d)

Neither can one of several sureties claim an advantage from any security which is given by his co-surety, nor object if that security be taken away. As where one surety assigned, as an additional security, the dividends of certain stock to the grantee, and afterwards, on an assign-

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Grantee must be cautious not to discharge sureties by favour to the principal.

(a) *Burke's C.* cited by Lord Eldon in *English v. Darley*, 2 B. & P. 62.

(b) *Eyre v. Bartrop*, 3 Madd. 221.

(c) *Capel v. Butler*, 2 S. & S. 457.

(d) *Sparkes v. O'Kelly*, 2 New R. 421; 10 East, 369.

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By consoli-
dation. 1. In
annuities.

ment of the annuity, re-purchased these dividends, it was held that his co-sureties were not discharged. (a)

Thirdly. An annuity ceases by consolidation or unity of possession, as it is generally termed, which is where the obligations of the grantor and grantee become vested in the same person. In the case of a personal obligation there is little to be observed; the contract for the annuity ceases totally as in all other cases on such consolidation.

Where, however, the grantor of an annuity assigned it with all securities for a valuable consideration to A., but part of the consideration money belonged to B., one of three co-sureties, and by a deed between A. and B. it was agreed that the former should retain out of the annual payments sufficient to pay him the principal sum advanced and interest, and that when he should have been paid principal and interest the annuity should be for the benefit of B.; it was held that the annuity was not thereby extinguished, but continued subsisting between the several co-sureties, at least until A. had been repaid. (b)

2. In rents.

But in the consideration of the obligations which attach upon land, there will be occasion for some discussion with reference to this subject. Here also the general principle is, that when the land charged with a rent is conveyed to the grantee, or when the grantee of the rent conveys it to the owner of the land, the charge merges in the greater interest, and the rent is extinguished. (c) So far, indeed, does the principle extend, that if the grantee purchase only a small part of the land charged, yet the whole rent is extinguished, and cannot be apportioned. (d) For which Lord Coke (e) gives this reason: "That the rent is entire, and against common right, and issuing out of every part of the land, and therefore by purchase of part it is extinct in the whole." Littleton (f) adds, "That not only the rent is

(a) *Browne v. Lee*, 6 B. & C. 689; 9 D. & R. 700.

(b) *Ib.*

(c) *Holden v. Smalbrook*, Vaugh. 198.

(d) *Litt. s. 222.*

(e) *P. 147, b.*

(f) *In the above section.*

extinct, but the annuity also," for as it is stated, (a) where the party extinguishes one claim for the same right, the law will discharge the other. This must of course be understood of one grant alone, which is open to the twofold construction explained in the 7th chapter.

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TION.**

Before this principle can apply, there must be a right to the present possession of the land, for though the grantee be entitled to a reversion, his interest in the rent does not cease while there is a precedent interest in the land existing in some other person. As where a grantee in fee of a rent purchased the remainder of the estate charged, dependent on a life estate, it was determined that the rent continued during the existence of the tenant for life. (b) And the grantee's widow may claim her dower out of it (c) when the land does devolve upon the grantee's heir.

There must be a right to the present possession of the land.

In like manner the grantee must be in the actual possession and enjoyment of the rent when the possession of the land accrues, for if he have assigned it over, it is not merged. This is shown in a case (d) where a devisor devised land to one in tail, remainder to another, and directed the tenant in tail to grant a rent in fee to the remainderman. The rent was granted and assigned over. Then the tenant in tail died without issue, and the land vested in the grantee of the rent. The Court of King's Bench adjudged, that though it would have merged in his hands, yet, as it had been granted over, it still continued. And though, if the conusor of a statute, having a rent charge, purchase the land out of which it issues, it is lost by the unity of possession, yet it is otherwise if the conusee have taken it in execution on an extent; for then the interest of the conusee is not affected by the unity of possession. (e)

And of the rent.

This unity must also be absolute, since a conditional union will not have the same effect. Accordingly in equity, where a mortgage in fee is considered as a conditional conveyance

The unity must be absolute.

(a) In Dyer, 140 a.

(b) Weston and Garmon's C., 1 Leo. 255.

(c) Perk. Dower, s. 340.

(d) Gouldwell's C. Pop. 131; S. C. Dutton v. Ingram, Cro. J., 427.

(e) Lillingston's Case, 7 Co. 38.

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The interest
must be of the
same nature.

The possession
must be equally
beneficial.

by way of security for the payment of money, the rent is not extinguished, even though the mortgage be for the payment of the arrears of an existing rent. (a)

The party's interest in the two estates must be of a similar nature, otherwise the rent will not be extinguished, but may be only suspended. Thus if tenant in tail of a rent purchase the land charged in fee, the rent ceases while he exists, and so long as the line of descent under the estate tail corresponds with the line of descent of his heirs general, or so long as the succeeding tenant in tail holds the same land in descent under his ancestor's title. But should the original tenancy in tail become distinct from the title of the holder of the land, the rent will again revive. (b) Hence the tenant in tail of the rent should, on his purchase of the land, by fine or recovery, destroy the entail. He may indeed enfeoff a stranger with warranty, and that, according to the opinion of Hobart, as expressed in *Heliot v. Saunders*, will give the land discharged of the rent, for the warranty will extend thereto.

It seems that the possession of the two rights must be equally beneficial to create an unity, which shall extinguish the rent. As if the grantee of the rent be made the trustee of the land for the use of the grantor, or any other person, it would not be held in a court of equity that the rent was extinguished, though perhaps in law, where trusts are not recognized, the principle would prevail. The point is argued in a case reported by Anderson, (c) but no decision is given.

One of the points argued in the case of *Gough v. Hayward* (d) was, whether the rent was not extinguished. The testator had bequeathed a term of years to his widow, whom he made his executrix, until she married again, on which event she was to have a rent only issuing out of the term. It was objected that, as the term vested in her as the executrix, the rent became extinguished, or rather never arose,

(a) *Elliott v. Hancock*, 2 Vern. 143.

(b) *Heliot v. Saunders*, Cro. J. 700.

(c) 1 And. 83.

(d) *Bridg.* 54; 1 Roll, R. 247; Roll. Abr. 610. above, page 258.

because of the unity of title; but the Court determined that there was no extinguishment here, as the executrix had assented to the legacy under the will.

Where the land is holden by joint-tenants, and the rent is granted to one, it is in his election whether the rent shall be extinguished or not, for the rights are not so united as to effect the extinguishment at once. And as to this election, a devise of the rent by the joint tenant would be strong evidence of his intention that it should continue. (a) This case indeed is stated in Plow. Comm., (b) that if a man grant a rent in fee to the tenant of the land and another, on the death of the former, his portion will not survive to the joint tenant, for it had merged in the possession of the land, and therefore was not in jointure at the time of his death.

Where a rent is charged expressly on certain lands, and a power of distress is also given in other lands, by way of additional security, the rent is not extinguished by the grantee's possession of these latter lands. (c)

This unity of possession may be created by the operation of law; by the act of the parties, either all jointly, or one only; by the act of the party united with the operation of law.

Where by the operation of law an unity of possession is created, which is not entire, an apportionment is allowed. Thus Littleton says, in section 224, "If a man hath a rent charge, and his father purchase parcel of the tenements charged in fee, and dieth, and this parcel descend to his son, who hath the rent charge, now this charge shall be apportioned according to the value of the land, because such portion of the land purchased by the father cometh not to the son by his own fact, but by descent and by course of law." And the effect is the same in the converse case, where the rent descends. And so it is, if the tenant give to the father of the grantee part of the land in tail, and this descend to the grantee, the rent shall be apportioned.

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Where there are
joint tenants.

How the unity
may be created.

An apportion-
ment will be
allowed when
the unity of
possession is
created by ope-
ration of law.

(a) Dyer, 319 b.

(b) Plow. 419; Co. L. 188 a.

(c) Co. L. 147.

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Lord Coke (a) also states this case in farther illustration of this proposition. If a man hath issue two daughters, and grant a rent charge out of his land to one of them, and dieth, the rent shall be apportioned; and if the grantee in this case enfeoffeth another of her part of the land, yet the moiety of the rent remaineth issuing out of her sister's part, because the part of the grantee in the land by the descent was discharged of the rent.

When it proceeds from the acts of the parties.

When it is created by the joint act of all the parties, the intention which they express will prevail; but in the absence of all expression of intention, the general principle will no doubt operate.

Where it proceeds from the act of one of the parties, an apportionment may sometimes be allowed.

In one case indeed it was held that not only there was no extinguishment, but not even an apportionment of the rent. It is difficult to assent to the judgment, unless it is to be considered as proceeding principally on the presumption of intention:—it was *Knight v. Calthorpe*, 1 Vern. 347. There a man on his marriage charged his lands with a rent for his wife's jointure, and afterwards devised a part of those lands to her. A bill was filed in Chancery by the devisee of the remainder, that the lands devised to the wife might bear their proportion of the rent charge. But the Lord Chancellor dismissed the bill. "The grantee of the rent charge may," he observed, "distrain in all or any part of the lands for her rent; and there is no reason to abridge her remedy in equity. Her husband certainly intended her some benefit by this devise, and he has not declared it should be accepted in part of the rent charge." What is here said as to the power of the distress, is undoubtedly correct, but the principle of extinguishment proceeds mainly on that position. For it is presumed that the party purchasing the parcel releases his charge therein, which is the whole rent, and does not reserve it for the rest. Yet the qualification of the rule which is now under discussion

(a) Co. L. 149 b.

applies on the ground that the grantor, without expressing an intention, shall not be taken to diminish a benefit already conferred. Therefore that a rent ought not, under such circumstances, to be extinguished, but, according to more equitable principles, apportioned.

Lastly, where the unity is created partly by the act of the party, and partly by the operation of the law, an apportionment is allowed, as in the instances quoted by Lord Coke.^(a) If the father within age purchase part of the land charged, and alieneth within age and dieth, the son recovereth in a writ of *Dum fuit infra ætatem*, or entereth; in this case *the act of law is mixed with the act of the party*, and yet the rent shall be apportioned; for after the recovery or entry the son hath the land by descent. And so it is in case the son recovereth part of the land upon an alienation by his father, *Dum fuit non compos mentis*. Again, a man seised of lands in fee taketh a wife and maketh a feoffment in fee, the feoffee grants a rent charge of 10% out of the land to the feoffor and his wife, and to the heirs of the husband, the husband dieth, the wife recovereth the moiety of her dower by the custom, the rent shall be apportioned, and she may distrain for 5*l.* which is the moiety of the rent. In which case two notable things are to be observed. First, albeit the dower be by relation above the rent, yet when the wife recovereth her dower, she shall not have her entire rent out of the residue, for a relation or fiction of law shall never work a wrong or charge to a third person but *in fictione juris semper est æquitas*. Secondly, that *albeit her own act do concur with the act in law*, yet the rent shall be apportioned.

This case seems very analogous with the case of Knight v. Calthorpe, above stated, but the judgment here seems much more equitable.

It is manifest that this principle of law may in some instances be attended with inconvenience, if not with injustice, and to some extent at least relief may be ob-

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Where it is created by the operation of law and by the act of the party.

There may be relief in equity.

(a) Co. L. 150 a.

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OR
SURRENDER..

tained in a court of equity. There is a case^(a) where a party entitled to a rent charge under a settlement purchased a small part of the land charged before the rent came to him, and while he was ignorant of his right in it. The Master of the Rolls, Sir Joseph Jekyll, decreed an apportionment, and that the rent should stand charged on the land in proportion to that which was unpurchased. "If one," he says, "who has a rent charge issuing out of lands purchaseth part of the lands, the whole rent is extinguished; but if part of the lands come to him by descent, the rent shall be apportioned, because the law works no wrong. In the first case the rent is extinguished, because the purchase is the party's own act; but since the law calls it a wrong, I think this court would relieve him; but here the plaintiff was unacquainted with his title when he purchased part of the lands: he was not ignorant of the law, but of the fact, and therefore, according to many precedents and the common rules of equity, he ought to be relieved." He certainly intimates in this judgment a more extensive relief in cases of consolidation than appears to have been granted.

By release or
surrender.

Which must be
by deed.

By means of a
release a rent
may be appor-
tioned.

Fourthly. An annuity may be determined by a release or surrender, regarding which the rules applicable to all other contracts also prevail in this. As an annuity can only be created by deed, the release or surrender must be by an instrument of equal authority, and cannot be by parol. ^(b) This extends to the arrears as well as the general body of the annuity, for they are secured by the same instrument as the latter. ^(c) Although an estate in the rent may commence without deed by operation of law, as where there is a tenancy by the courtesy or in dower, still the surrender of the rent can only be by deed. ^(d)

By means of a release an annuity or rent charge may be apportioned, that is, may be diminished. For Lord Coke says,^(e) "If a man hath a rent charge of twenty shillings,

^(a) Slater v. Buck, Moseley, 256.

^(b) Perk. Surrender, sect. 582; Cupit v. Jackson, M'Clel. 495; 13 Pri. 721.

^(c) Ib.

^(d) Co. L. 338.

^(e) Co. L. 148 a.

he may release to the tenant of the land ten shillings, or more or less, and reserve part; for the grantee dealeth only with that which is his own, viz. the rent, and dealeth not with the land, as in case of purchase of part. And so it was held in the common place, Hill. 14 Eliz. which I myself heard and observed."

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But where there is a general right to hold certain lands charged, a release by the grantee of the right in a parcel thereof does not operate as an apportionment of the rent, but as a general release, because, as was observed above in reference to consolidation, the charge is entire, and the rent issues out of the whole. (a) If however the grantor be desirous of relieving a portion of his estate from the charge, the grantee may release the charge on that part without affecting his security on the remainder, provided the former covenant that the release shall not operate to free and disencumber the residue, because such covenant will be considered as a new grant. (b)

How lands may
be relieved from
a rent charge.

Lands subject to rents payable to the curate of a parish and to a charity were sold in separate lots by auction: there was a condition "that the rents should in future be charged upon and paid by the purchaser of lot 1 only." The Master of the Rolls held that the other purchasers could not claim a total exoneration by an Act of Parliament, but were only entitled to an indemnity from the purchaser of lot 1. The reader is advised to consult the report of the case for the observations of his Honour upon the nature of the indemnity which might be required. He expressed his assent to a proposal for the grant of a rent in fee charged upon that land, equal in amount to the aggregate of the rents at least, and even thought it might be somewhat higher, to meet any expenses that might be incurred, but he did not deem it necessary that a term of years should be created. (c)

(a) *Butler v. Monnings*, Noy, 5.

(b) 3 *Wilde's Supp. to Bart. Conv.* 678.

(c) *Casamajor v. Strobe*, 2 *Swa.* 347.

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Care must be
taken to confine
the release to
the proper limit.

When the release is prepared care should be taken that its operation may be properly confined to the matter proposed to be released, especially in cases where it is intended to release the arrears, but not the whole annuity. Though the Courts undoubtedly will interpret the instrument so as to effectuate the intention of the parties as far as it appears. As where in an early case a release had been executed in these terms; "I have received the last half-year's annuity, of which said payment I confess myself satisfied, and do by these presents release to the said George all actions,"^(a) it was held not to operate as a release of the annuity generally, nor of the future payments. So, also, a release of all actions before the day of payment did not discharge the subsequent arrears of an annuity, because they constitute a duty not then in being.^(b)

In Fitzherbert's Abr. Release, 20, a decision in 12 Rich. II. is cited, where it was held, that a claim for an annuity by prescription was not released by a release of *all actions, real or personal, arising from any account, debt, or contract whatsoever*, because this being a prescriptive right was not claimed by contract.

It is stated, in Pennant's Case, (c) that "if he who hath a rent charge accept the rent due at the last day, and thereof make acquittance, all the arrearages due before are thereby discharged; and so it was adjudged between Hopkins v. Morton, Dyer, 271, but there the case is left at large." The report in Moore, 87, agrees with this note in Coke. But in the margin of Dyer's Report, L. C. J. Treby has noted, "It was holden for law in the Exchequer, Trin. 29 Eliz. per Curiam upon good advisement, that acceptance of the later rent is not a discharge of the arrears. The case was between Rame and Littleton."

A distinction is mentioned by Lord Coke in his 3 Report, 65, b, that the grantor is not bound to pay an annuity without acquittance, but he who receives a rent charge is not

(a) Diggs v. Chute, 1 And. 64; Moore, 133, cited in Abree's Case, Hetl. 15.

(b) Anon. Godb. 11.

(c) 3 Co. 65.

compellable to make an acquittance. And the former position is also supported by Perkins. (a)

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It has, however, been held, that an acquittance for the last day of the payment of rent is an estoppel of the previous arrears. (b) But to work this estoppel it must be under the hand and seal of the grantee; if only under his hand, as almost all receipts now are, it will only be evidence raising a presumption of the previous payments. (c)

One mode which operates as a release of a rent charged on land and requires some attention here, is where a fine is levied. This principle is established; (d) in general all interests, whether in possession, reversion, or remainder, in any lands or tenements, and any profit issuing out of them, will be included in the description of the lands or tenements. Hence, where a tenant in tail of a rent charge agreed with the tenant of the land to extinguish it, and to levy a fine of the land to the tenant upon a conusance of right and a release, and the fine was levied of the land, without any mention of the rent, it was held to be barred by the opinion of Hobart and Harvey, J.'s, against Hutton, upon the ground that the term land included the rent. (e) This was contrary to the opinion expressed in Plow. C. 435, and does not seem to have been generally assented to. It has, however, been determined in a Court of Equity, (f) that a fine with proclamations, as it is a bar to all charges, so it extinguishes a rent issuing out of the land.

Effect of a fine
in releasing the
rent.

The case where the party interested in the continuance of the rent is also party to the fine is easy; he is estopped from denying the release by his having joined in that act. But a very different question arises as to persons not parties to the fine, because the rule of law here applies that a fine will not bar any estate which is not divested and put to a right. (g) Accordingly it is held, that the grantee of a rent

(a) Conditions, s. 780.

(b) Palmer v. Stabick, 1 Sid. 44; 1 Lev. 43.

(c) Fountain v. Guales, Comb. 60. (d) Bayl. on Fines, 94.

(e) Heliot v. Saunders, Cro. J. 700; Winch, 109, 121. See also Carter, 24.

(f) Wakelyn v. Warner, 2 Ch. C. 247.

(g) 9 Co. 106, a.

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shall not be barred by a fine with proclamations and non-claim, for his estate is not divested out of him, but always remains in him. (a)

Yet, in *Whitfield v. Faussett*, (b) Lord Hardwicke seemed inclined to hold that a fine levied by the tenant of the land would bar the party entitled to the rent charged thereon, though he were no party to the fine. He referred to the observation in *Carter*, 24, where Bridgman, C. J. said, "that a rent charge is gone by a fine levied of the land;" but that meant when the grantee of the rent levied it. This point was, however, examined at length in a case which afterwards came before the Court of King's Bench, reported by Mr. Cruise in his *Treatise on Fines*, (c) and lately given to the profession in 3 Dougl. 148, by the name of *Goodright d. Hare v. Board*. There Lord Bolingbroke had granted a rent charge by demise and redemise to the lessor of the plaintiff, with power to enter on default of payment. He afterwards conveyed the lands to a purchaser for valuable consideration, who levied a fine, and the question was, whether the rent was barred thereby, and the Court held that it was not. Lord Mansfield delivered the judgment, and said, "This question depends upon a rule of law founded in good sense, and to which I know of no exception, viz. that no fine shall bar an estate either in possession, reversion, or remainder, which is not divested and put to a right. This is the first resolution in *Margaret Podger's Case*. This general rule is illustrated, explained, and applied in the books to a variety of cases. Thus a collateral interest, as a rent charge, or a right of common, cannot be barred by a fine. The authority in *Carter* is mistaken. The owner of a rent charge levied a fine of the land, and it was held that the rent charge was gone by the fine, but a rent charge in a third person will not be barred by a fine and non-claim. The parties to a fine, or one of them, must be seised and possessed adversely to the interest to be barred. Now, at the time of the conveyance to

(a) 5 Co. 124, b.; Cro. J. 60.

(b) 2 Ves. S. 387.

(c) P. 249.

(d) 9 Co. 106.

Jones, there was no adverse possession by Lord Bolingbroke, there were no arrears of the annuity, and Mrs. Hare had no right of entry. At the time of the fine being levied a year and a half's arrears of the annuity were due, but Mrs. H. was not bound to resort to her remedy from the land; she had other security." (a)

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Mr. Atherley, however, does not assent to the general position, and thinks that the rent charge will still be barred by the fine and non-claim after it is due. He relies upon the language of the statute of fines, which is sufficiently comprehensive to embrace this subject, and contains no exception.

But though a fine may be a bar to a rent charge, or may be a mode of conveyance by which it may pass to another, the arrears due before it is levied are not lost, but belong to the party levying it. (b)

According to the general principle a release, if executed so as to be a fraud upon an assignee of the grant, or any other person, will be vacated. It was accordingly holden, in Lillingstone's Case, (c) that where the grantee of a rent acknowledged a recognizance in the nature of a statute staple, and afterwards released the rent, the release was inoperative against the creditor, although he did not sue out execution on his recognizance, until the rent had been released. It is also stated there, that a husband, tenant in fee of a rent, cannot release it to the tenant of the land so as to destroy his wife's right to dower out of it.

The release must not be a fraud upon third parties.

But where there was a cause in a Court of Equity brought against the grantee of an annuity by his creditors, it was held by the Vice Chancellor, that the grantor, if not made a party to the suit, might obtain a release on good consideration from the grantee, and did not require the leave of that Court; neither was he bound to pay the consideration for the release into Court. (d)

A husband entitled to certain annuities settled them on

(a) Note to Shep. To. 35.

(b) Witherhead v. Harrison, T. Jo. 2; Vaugh. 36.

(c) 7 Co. 38.

(d) Johnson v. Chippendale, 2 Sim. 55.

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his wife after his decease, the grantor becoming bankrupt, the settlor proved for the value against the bankrupt's estate, and obtained certain dividends on that value. The wife claimed at his decease for fresh annuities, but abandoned that claim, the Master of the Rolls holding her entitled to the dividends which her husband had received. (a)

After a long lapse of time, during which no claim has been made, but there has been continual acquiescence, a release may be presumed. And such presumption has been raised in many cases in the courts of equity. As where an annuity had not been demanded for forty years, and no consideration for it appeared in the deed, the Court of Chancery decreed the estate to be discharged from it. (b) Again, where a statute of recognizance to secure the payment of annuities had been executed for many years, but not enforced, and from the circumstances of the case there was reason to believe it had been discharged, although not given up, the Court of Equity vacated an extent which had been sued out upon it. (c) So in *Southcote v. Southcote* (d) an injunction was granted against the proceeding on an annuity deed which had been dormant for forty years. In a later case (e) an annuity had been devised to one for life, who died in 1718. In 1740 the grantee's representatives brought a bill for the arrears from 1708, but the Master of the Rolls dismissed it with costs. "The distance of time," he says, "is the strongest presumption that it has been paid. The Statute of Limitations ought to be the rule to direct the court in this as in other cases; though the doctrine has prevailed that the statute will not run as to a legacy, yet it will not hold as to an annuity." But if the assets of a testator are permitted to be distributed without any claim, it forms a presumption of payment (f)

(a) *M'Lean v. Longlands*, 5 Ves. 71.

(b) *Bonnington v. Walthall*, 2 8vo. Rep. Ch. 219.

(c) *Baldwin v. Proctor*, 1 8vo. Rep. Ch. 102.

(d) *Ib.* 106.

(e) *Smallman v. Lord Hamilton*, 2 Atk. 71. See also *Brown v. Claxton*, 3 Sim. 225.

(f) *Higgins v. Crawford*, 2 Ves. jun. 571.

As to the statutes of limitation, it has been enacted by the 32 Hen. VIII. c. 2, that rents should not be recovered in assizes, unless there had been a seisin within certain periods there specified. As sixty years for a writ of right, fifty for possessory writs founded on an ancestor's possession, and thirty for possessory writs founded on the party's own possession. The statute was wholly referable to seisin, and therefore only applied to rents whose title depends upon seisin.^(a) If the title be founded upon a deed or specialty, and require no external assistance from the fact of seisin, this statute does not limit the party's claim. So also if the rent have been created by an act of parliament. Such was the doctrine as established in the early cases after the passing of that act. It seems, therefore, that the statute would only apply where any of the real actions therein mentioned are brought for the recovery of rents claimed by prescription or by devise. In one instance it has been held that church pensions are within the limitation of this statute.^(b)

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How the statutes of limitation apply.

Again, in the 21 James I. c. 16, it is enacted, that all actions of arrearages of rent shall be brought within six years; the language here is very general, yet coupled with the previous provisions of the statute, which expressly apply to parol contracts, it has been determined that rents granted by specialty are not within the enactment,^(c) for as it was observed, there is no time from which the statute can begin to run.

There being then no limitation at law, neither is there any analogous relief at equity. This was held by Lord Hardwicke in the case of *Aston v. Aston*,^(d) and the Master of the Rolls, Sir W. Grant, in *Stackhouse v. Barnstone*;^(e) though both these eminent judges admit that the presumption of a release may be drawn from long

(a) Co. L. 115. Harg. n; 2 Saund. 66. n. 8; *Fawkner v. Bellingham*, Lit. 42; Cro. C. 80. 214.

(b) *Walker v. Deam of York*, 3 Keb. 366; *Mansel v. the same*, ib. 562.

(c) *Harvey v. Thorn*, Aleyn, 62; *Hodsdon v. Harridge*, 2 Saund. 66.

(d) 1 Ves. sen. 267.

(e) 10 Ves. 467.

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acquiescence. In the case before Lord Hardwicke, indeed, the owner of a rent charge had suffered it to run into arrears for eight years, and he did not think that it could be presumed from that lapse of time to be absolutely released.

Not only the entire contract for the annuity is not affected by the statute of limitations, but the arrears also which depend upon the same instrument are not barred thereby. (a) At the same time, perhaps, it may be said that arrears will not be recovered in a court of law beyond the period of twenty years, since payment is presumed on all instruments under seal after such a lapse of time.

Rents are expressly excepted from the application of the late prescription act. 2 & 3 Will. IV. c. 71.

By redemption.

5thly. An annuity may be determined by redemption. It is sometimes thought desirable by the parties to this contract, that the grantor should have a power of terminating the annuity by redeeming it, that is, by paying to the grantee such a sum of money as shall be thought the fair value of his interest therein. This agreement is most frequent, where annuities have been granted for the purpose of raising money, and the grantee usually stipulates to have the consideration originally advanced or a portion of it returned.

Which is usually agreed upon by the parties.

In pecuniary transactions the grantee also generally stipulates to have a certain previous notice before redemption, that he may provide another investment for his money, and not incur the risk of losing his interest by the consideration being unexpectedly returned to him. In default of notice a payment of either simple or annuity interest is sometimes required. The effect of this power of redemption with regard to the statutes of usury has been considered at page 187.

Will sometimes be decreed by a court of equity.

Not only the parties may agree in the original contract that the annuity shall be redeemable, but at any time during its continuance they can determinate it by mutually agreeing

(a) *Cupit v. Jackson*, M'Cle. 495; 13 Pri. 721.

to a redemption. And in cases of fraud and unconscionable bargains the courts of equity will decree a redemption, though against the wish of either party.(a)

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In like manner, where there has been fraud or oppression in settling the terms of the redemption, a court of equity will grant relief. This is exemplified by the case of *Lawley v. Hooper*, (b) before Lord Hardwicke. There the sum of 1050*l.* had been advanced, and it was agreed that the annuity should be redeemable on payment of that sum, but afterwards the grantee, availing himself of the distress of the grantor, compelled him to indorse a larger sum as the price of the redemption. Lord Hardwicke relieved him, and directed that the sum of 1050*l.* only should be repaid, allowing interest thereon, and the insurance upon the grantor's life, if any such had been really paid.

Where under circumstances of distress several annuities had been granted, with a power of redemption within a limited period, Lord Hardwicke decreed a redemption, although that period had elapsed, on payment of the principal advanced with interest from the time that the grantor had made his offer to redeem.(c)

Where it has been agreed that an annuity should be redeemed at a sum according to the stipulations in the original grant, or without reference thereto; should that sum not be paid down at once, but be allowed to remain on interest, the grantor cannot charge more than legal interest thereon. Because the contract becomes one of mere debt between the parties, and loses its character of an annuity. If the annuity had been irredeemable, but the redemption is assented to, though payment of the money is postponed for a definite time, such a sum may be required for the price of the redemption as would allow more than legal interest from the date of the agreement, but then that will not appear.(d)

(a) *Fawcett v. Bowers*, 2 Vern. 288 ; *James v. Oades*, ib. 402.

(b) 3 Atk. 278.

(c) *Sir W. Stanhope v. Cope*, 2 Atk. 232. See also *Searle v. Lord Carpenter*, Amb. 242.

(d) *Marsh v. Martindale*, 3 B. & P. 134.

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Power of redemption may be lost.

But the grantor may lose his power of redemption by express release, or by laches, which forms a presumption of a release. A strong instance of such laches is presented by the case of *Floyer v. Lavington*, (a) There for 800*l.* a rent charge of 48*l.* was granted in fee upon condition that if the grantor, during his life, should give notice and pay the 800*l.* by instalments during his life, the grant should be void. The mortgage continued for sixty years, the grantor died and the grantee assigned to a purchaser, on a valuable consideration. It was decided by Lord Chancellor Cowper that the grantor's heir could not then redeem, principally on the ground of the great lapse of time.

Again, there is a species of foreclosure which a court of equity will apply against the redemption when the grantor is in default; of which there is a case in 1 Vernon's Reports. (b) A rent charge was granted, with a power of entry to satisfy arrears redeemable on the payment of a sum of money. There were long arrears, and no property distrainable on the land, which was also greatly encumbered. The Lord Keeper decreed that the grantor should be foreclosed of his right to redeem the rent charge, but would not direct the land to be sold or transferred absolutely.

Statutory redemption on bankruptcy and insolvency.

This leads to the sixth mode of determining an annuity, namely, by bankruptcy and insolvency, in which cases a species of statutory redemption has been established with regard to the personal obligation of the grantee, but not extending to the charges which the grantor has created upon his real estate.

1st. Of bankruptcy.

1st. As to bankruptcy. The effect of a commission of bankruptcy is to divest the bankrupt of all his property for the benefit of all his creditors, it is therefore apparent at once that the continuing to hold him responsible for the payment of an annuity is either useless, inasmuch as he has nothing to answer it, or it is injurious, as it tends to cripple those fresh exertions in his trade which it is the object of his bankruptcy to enable him to make. The spirit of the

(a) 1 P. W. 269.

(b) *Carnesew v. Arscott*, p. 209.

bankrupt law therefore requires that a certificate should terminate an annuity as against the bankrupt. But many difficulties arose, resulting from the nature of the contract, the securities of the grant, and the practice in bankruptcy, and it has taken nearly a century to effectuate the purpose of the bankrupt laws as respects this contract.

The ordinary mode of securing an annuity has been, for a long period of time, by a deed of covenant, and by a bond in a penalty conditioned for the due payment of the annuity. The former was an instrument for securing the payments as they became due, and there was accordingly a fresh breach on each payment falling into arrear, but no more. If then at the time of the bankruptcy there happened to be no arrear, there was no breach of the covenant, and the bankrupt not being indebted to the grantee, the latter could not prove against his estate, which was swept away for the benefit of the other creditors, and the grantee lost his remedy; unless indeed the bankrupt afterwards acquired property, when he might pursue his claim for the arrears which subsequently fell due. And where there did happen to be any arrear, to that extent only could the grantee prove, and the bankrupt was relieved.

But when a bond had been given, there was a difference resulting from the legal effect of the breach. As the condition is the due payment of the annuity, when there is *any* arrear that condition is broken, the bond which depends thereon is forfeited and becomes a present debt. If then at the time of the bankruptcy the annuity were in arrear, though only for a single payment, the whole bond was forfeited, and the money payable thereon was a debt due to the obligee which was proveable under the commission.^(a) And so far was this carried, that the bond was held forfeited for the purpose of proof in bankruptcy, by any arrear which had previously existed, although satisfied and waived before the act of bankruptcy.^(b) This is ad-

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What was the
practice in
bankruptcy
formerly.

(a) *Ex-p. Le Compte*, 1 Atk. 251; *Ex-p. Belton*, Ib.; *Wyllie v. Wilkes*, 2 Dougl. 519.

(b) *Perkins v. Kempland*, Sir W. Bl. 1106.

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The new provisions introduced by the statute 49 Geo. III. c. 121, s. 16.

mitted by Lord Mansfield (a) to have been a legal subtlety, which, however, was established for good purposes. Lord Rosslyn held to the same effect in *Exp. English*. (b)

As it would have been manifestly unjust towards the other creditors to allow the whole penalty to be proved, when a small portion only was due, so on the other hand, the grantee had a right to have the loss of his future security considered. In the equitable jurisdiction established in bankruptcy, a practice was introduced of having the annuity valued at the date of the commission, and allowing the grantee to prove for such value, with the amount of the arrears that were then due. This was recognised by Lord Hardwicke and prevailed for many years, but no good reason could be suggested why there should be any such difference in the effect of the instruments. Such, however, remained the law until the 49 Geo. III. c. 121, by the 16th section of which it was enacted, "that it should be competent to any annuity creditor of any person against whom a commission of bankrupt should issue after the passing of that act, whether the same should be secured by bond or covenant, or bond and covenant, or by whatever assurance or assurances the same should be secured, and whether there should or should not have been any arrears of such annuity at or before the time of the bankruptcy, to prove under such commission as a creditor for the value of such annuity, which value the commissioners should have power and were thereby required to ascertain, and the certificate of every bankrupt, under whose commission such proof should be or might have been made, should be a discharge of such bankrupt against all demands whatever in respect of such annuity, and the arrears and future payments thereof, in the same manner as such certificate would discharge the bankrupt with respect to any other debt proved or which might have been proved under the commission." By this judicious enactment, which is due to the exertions of Sir Samuel Romilly, the distinct proceeding was intended

(a) In *Wyllie v. Wilkes*, 2 Doug. 523.

(b) 2 B. C. C. 610.

to be abolished, and the bankrupt was to be wholly relieved, but this intention was in some instances defeated by a decision which the Court of King's Bench found themselves bound to make, though evidently against the purpose of this statute. The grantee was permitted to prove against the bankrupt's estate for the arrears and for the value, and therefore could not proceed against the grantor for any subsequent payment, since his certificate would be a bar; but where there was a surety who guaranteed the due payment of the annuity, he might be compelled to discharge such payments as they fell due. As therefore the surety could not compel the grantee to come in and prove under the commission, there was no debt, quoad him, until he was in a condition to be damnified, and consequently, whatever payments he was called upon to pay were not debts proveable under the commission, and were not discharged by the certificate. Hence it was held by the Court of King's Bench that the surety might sue the grantor for money so paid by him, and his certificate was no bar. (a) And even where the grantee did prove under the commission for the amount of the value, and the surety acting upon a power of redemption contained in the grant of the annuity, redeemed the same, it was held that the act of parliament would not allow the surety to prove, and therefore that the bankrupt's certificate was no answer to the surety's demand of the payments accruing after the bankruptcy, and the value so paid by him on the redemption, in an action brought on an indemnity bond. This judgment of the King's Bench was supported by the Court of Exchequer Chamber on a writ of error. The grantor applied for relief by injunction against the execution in a court of equity. But the Vice Chancellor refused it at once as to the arrears, though as to the redemption price he had some doubts, but the bill was ultimately dismissed with costs as to this also, after the statute 6 Geo. IV. c. 16, had been enacted. (b)

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(a) *Welsh v. Welsh*, 3 M. & S. 333.

(b) *Flanagan v. Watkins*, 3 B. & A. 186; *Watkins v. Flanagan*, 13 Pri. 24; 1 Bing. 413; 8 Mo. 480; 6 Madd. 280; 3 Russ. 421.

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By 6 Geo. IV.
c. 16, s. 54, 55.

Thus it will be seen that the bankrupt was not relieved; but the machinery of the proceedings was altered and rendered more complicated. For the grantee had to sue the surety, and the surety sued the grantor. But this has been corrected by the last Bankrupt Act, 6 Geo. IV. c. 16. By the 54th section of which it is enacted, "that any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the time of the bankruptcy, shall be entitled to prove for the value of such annuity, which value the Commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission."

So far in effect the statute, 49 Geo. III. c. 121, is re-enacted, but it is carried farther, for by the next section 55, it is enacted, "That it shall not be lawful for any person entitled to any annuity granted by any bankrupt to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity and for the "payment" (a) thereof, and if such surety, after such proof, pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity, and if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due) pay the sum so proved as aforesaid, he may be sued for the accruing payments of such annuity until such annuitant shall have ("been") (b) paid or satisfied the amount so proved, with interest thereon at the rate of four per cent. per annum from the time of notice of such proof, and of the amount thereof being given to such surety, and after such payment or satisfaction such surety shall stand in the place of such annuitant in respect of such proof as aforesaid, to the amount so paid or satisfied as

(a) This should be "arrears."

(b) This word is omitted in the act.

aforesaid by such surety, and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant, or of such surety in respect of such annuity, provided that such surety shall be entitled to credit in account with such annuitant for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid."

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Notwithstanding these provisions the bankrupt is not relieved from all grants of annuities; for it has been decided that the fifty-fourth section only applies where the consideration is pecuniary. This has been lately settled after great deliberation, in a case (*a*) where one made a covenant to pay on the marriage of his son an annuity for his life, or until he became bankrupt, and in case he became bankrupt to his wife, unless she were living separate from him, or were dead, in which case it was to cease, after his death it was to be paid to his widow during her widowhood, and to certain trustees, to raise 2000*l.* for the children after the wife's death. The covenantor becoming bankrupt, the Vice Chancellor decided that the debt was not proveable under the commission. On appeal to the Lord Chancellor Brougham, he called in the assistance of Tindal C. J. and Littledale, J., and the Vice Chancellor's decree was affirmed. It was urged that if the covenant were not proveable under the fifty-fourth section, it was as a contingent debt under the fifty-sixth, which authorises the proof of contingent debts; but it was decided that the contingencies here were too difficult to be estimated.

Not universally
relieved.

Upon this last section, however, it may be noticed, that the following has been proved as a contingent debt. (*b*) The bankrupt, by his marriage settlement, covenanted with trustees to pay an annuity of 80*l.* for himself during his life, then to his wife for her life, and after her death to his children, if any; and farther, that after his death his

(*a*) *Ex parte Davis in re Wentworth*, Mont. & Bl. B. C. 122. 297.

(*b*) *Ex parte Tindal in re Gibbons*, Mont. & Mac. B. C. 415; Mont. & Bl. 375. 462; 8 Bing. 402.

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heirs, executors, or administrators, should within twelve months pay 4000*l.* to the trustees, on various trusts. The Vice Chancellor held that the trustees were entitled to prove under the commission upon the language of the act. But the Lord Chancellor Lyndhurst reversed that judgment on account of the great difficulty of estimating the value of the contingencies; but, on a re-hearing before Lord Brougham, Ch., assisted by the same judges as above, this decision of Lord Lyndhurst was reversed, and the debt was adjudged to be proveable.

Mr. Ellis (a) has stated a doubt whether the bankrupt may not still be liable to the surety, if the grantee do not come upon the surety, until after the bankrupt has obtained his certificate, and a final dividend has been declared, when the surety will have no opportunity of proving under the commission. "And," he says, "upon this point might arise the question whether to entitle himself to any claim against the bankrupt, he is bound to take immediate notice of the annuitant's proof, and pay the amount so proved; for it may be observed, that under the fifty-fifth section the annuitant does not appear to be bound to give notice to the surety of his proof, except for the purpose of entitling himself to interest from the surety upon the sum proved." There seems to be no reason why a surety ought not to be bound to take notice of the grantor's bankruptcy, and then he will have due notice of the grantee's proof against the estate, in which case he may make his claim at least for the amount, and probably it may be held that the assignees will be bound to reserve the dividends, so as not to declare a final dividend until that claim has been settled.

This act is retro-
 spective.

The language of this act has been held to be retrospective, and to apply to annuities granted before it passed. Therefore, where the grantor had become bankrupt, the Court of Common Pleas decided, that before the surety could be sued, the value of the annuity must be ascertained by the commissioners, although the annuity was granted,

(a) On Insurance and Annuities, p. 187.

and the grantor became bankrupt, before the 6 Geo. IV. c. 16. was enacted. (a) To this may also be added a case (b) which shortly after came on in the King's Bench. One Beswick had granted an annuity to Hone, which was secured by a warrant of attorney given by one Beale; judgment had been entered up in Hil. T. 1825. Beswick became bankrupt in June, 1827. The grantee did not prove for this annuity under the commission, but in Easter T. 1829, sued out execution against Beale, the surety. *Comyn* obtained a rule for setting aside this execution, on the ground that, under the circumstances of the case, this was a suing of the surety within the meaning of this section, and that the grantee ought to have proved under the commission against Beswick. *Busby* showed cause, and endeavoured to distinguish it from *Bell v. Bilton*, but the court held it to be within the meaning of the section, and made the rule absolute. The reader will probably remember that a similar construction was given to the words of the second section of the first annuity act. (c)

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What has been said above as to the restricted extent of this statutory redemption must be understood as applicable to a compulsory proceeding only, since such redemption is perfectly allowable in the case of a rent, at the instance of the grantee. For where the grantor had secured the annuity by the assignment of his real property, and had also given a personal security, and became bankrupt, the Vice Chancellor, on the grantee's petition, ordered the real estate to be sold to discharge the arrears and the value of the annuity, and if it should turn out to be insufficient, allowed the grantee to prove for the residue against the bankrupt's estate. It was contended that the valuation in bankruptcy was confined to cases where the annuity was secured on personal estate, and not on realty, but this distinction was not admitted. (d)

A rent charge
may be re-
deemed under
these acts.

(a) *Bell v. Bilton*, 4 Bing. 615; 1 M. & P. 574.

(b) *Hone v. Beswick*, MS. Trin. T. 10. G. IV. K. B.; 4 M. & R. 559.

(c) See page 116.

(d) *Ex parte Key*, 1 Madd. 426; *Ex parte Naylor*, ib. cit.

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It is not, how-
ever, within the
general order in
bankruptcy re-
garding the sale
of mortgaged
estates.

Course of pro-
ceeding on such
a sale.

Equitable title
to the annuity
will be enough.

There is a general order of the Court of Chancery, which authorises the commissioners to sell an estate on which a mortgage has been charged in satisfaction of that mortgage, without an order of the court for that purpose, this does not apply to a rent charge, and they have no power to sell the estate on which it is secured without an express order of the court on petition, the statute 6 Geo. IV. c. 16. not having touched this point. (a)

In such cases, where real property has been sold, the order of payment is, that out of the purchase money the costs of the application to the Court should be paid first, then of the sale, and the expenses incident thereto, then the arrears due at the date of the commission, and lastly, the value as ascertained by the commissioners. Arrears subsequent to the commission are not the subject of proof, and cannot therefore be claimed against the bankrupt's estate. (b) As the real security may be ordered to be sold, and the grantee may prove for the deficiency, so where he has any personal security, that also shall be sold before his proof can be allowed, as where a policy of insurance on the grantor's life had been assigned to the grantee, he was ordered to sell it on the bankruptcy of the grantor, and after deducting the expenses of the sale, and the amount of the premiums he had paid with interest thereon, he was to set off the residue against the value of the annuity, and the arrears then due; and if there were any surplus, it was to be paid over to the assignees of the grantor; if there were any deficiency, he was to be allowed to prove against the estate for that amount.

The grantee's title need not be strictly legal, if he have an equitable title, though not fully secured, it will be sufficient. As where it was agreed between a mother and her son that she should join in conveying her life interest in an estate to a purchaser, the son undertaking to secure her an annuity in consideration thereof, but after the execution

(a) *In re Delves*, Mont. & Bl. B. C. 492.

(b) *Ex parte Slack*, 1 G. & J. B. C. 346.

(c) *Ex parte Tierney*, Mont. & Bl. B. C. 78.

of the conveyance, and before the annuity was secured, the son became bankrupt; the Vice Chancellor held her entitled to prove for the value of the annuity and the arrears thereof at the date of the bankruptcy, as she had an equitable title to it, though not a legal. (a) So in a late case, a man, previous to the marriage of his daughter, wrote to the father of the intended husband, and to the latter, two letters, wherein he stated he should give his daughter 150*l.* a year. The marriage took place, and the annuity was paid for some years. The father became bankrupt, and the husband and wife offered to prove for the value of the annuity. But the commissioners refused to allow it, on the ground that the agreement was not so certain and explicit as to enable a court of equity to decree a specific performance. But the Vice Chancellor held it to be sufficiently clear, and directed the proof. (b)

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This, however, must not be supposed to extend to a case of non-enrolment, for there an annuity being void cannot be proved against the estate. But a question has been raised as to what would be the effect of a grant where the grantor fraudulently representing the property as within the exception of the annuity act, an enrolment has been omitted. Lord Eldon expressed great doubt in a case where he allowed the grantee to prove for the balance of the consideration for the *value of the annuity*, but reserved the dividends, and advised the grantee and the creditors to compromise, refusing to take his securities away from him, and without prejudice to any bill which he might think right to file for better relief. (c)

Not so where the annuity has not been memorialized.

Where there has not been a due enrolment, and the annuity is therefore void, the grantee is still entitled to recover the consideration which he advanced, and consequently may prove for that amount under the commission. As that is considered to be a debt due when it is paid to

But proof of the consideration is then admitted.

(a) Ex parte Brockliss, Buck's B. C. 406.

(b) Ex parte Sitger, Mont. & Bl. B. C. 100.

(c) Ex parte Wright, 1 Ro. B. C. 308. 19 Ves. 255.

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The grantee must make his election at once between proving for the consideration and for the annuity.

Bankruptcy of one of several grantors does not discharge the others.

Bankruptcy of the surety does not release him from subsequent liability.

the grantor, it is immaterial when the annuity is set aside, for if that be done after the bankruptcy, still by relation it is a debt due before, and will be barred by a certificate signed previously to the avoidance. (a)

The grantee must elect at once whether he will treat the annuity as valid or invalid. For in a case (b) where an annuity was secured by two bonds, and a payment falling due, a bill of exchange was given in satisfaction, but the grantor became bankrupt before the bill was due; the grantee attempted to prove this under the commission, but the proof was rejected, it being a future and contingent debt. The bonds were then found to be void, not having been enrolled, whereupon the grantee petitioned the Lord Chancellor for leave to prove for the consideration of the annuity. But this was refused on the ground of his having insisted on the securities at the date of the commission as valid.

Where there are several grantors, the bankruptcy of one, though it will be a discharge to him, will not release the others. (c) Mr. J. Chambre points out a difficulty that arises in this case, for if the grantee can prove against the estate of the one grantor, and can also proceed against the other, he may recover twice. But in all probability the commissioners of bankruptcy would restrain this double proceeding. At all events, it is but the same power which the grantee would possess if the grantors were all solvent; he might bring different actions against all, though the court would restrain him in taking out execution. In the case referred to it was stated that the bankrupt was in truth a surety, and not the principal grantor, but this did not appear on the deeds, and the court took no notice of it.

The statute 49 Geo. III. c. 121. s. 16, provided only for the bankruptcy of the grantor, and did not affect the situation of the surety. Therefore, the bankruptcy and certificate of a surety was no bar to an action brought against

(a) Walker v. Liscarry, 6 Esp. C. 98.

(b) Ex parte James, 5 Ves, 708.

(c) Barter v. Nichols, 4 Taunt. 90.

him by the grantee for arrears accrued subsequent to his bankruptcy. The regulation in that enactment cannot be complied with, because it is impossible to estimate the grantee's interest in the surety's covenant, inasmuch as it is wholly contingent upon the grantor's discharging his duty by paying the annuity, in which case no liability will arise. Such seems to be the rule of law as regards the grantee and the surety. But it has been expressly decided that as between joint sureties, if one of them became bankrupt, he still continues liable for contribution to the other for all payments subsequently falling into arrear.^(a) This was a decision on the same statute: it remains to be determined whether the provisions regarding annuity creditors, and contingent debts in the new act, will make any alteration in respect to sureties who become bankrupt.

It may be noticed, however, that a surety is only liable at law to contribution for his share of the loss, according to the number of sureties, as for one third, where there are three sureties, though one has been compelled to pay the whole, and the other is insolvent.

2ndly. Of Insolvency. The principle of the insolvent laws in regard to the insolvent is similar to that of the bankrupt. He is to be released from all his existing debts and liabilities on surrendering all his property to his creditors for their mutual benefit. But the same difficulties which obstructed the true object of the bankrupt laws were found to prevail in the cases of insolvency, in reference to this particular contract. Formerly the insolvent debtors' acts were passed at certain periods, and effected a relief to the debtors then in confinement, but had no future application; in modern times, as is well known, a new and extensive judicature has been created in the Insolvent Debtors' Court. However, this is not a permanent establishment, but has existed temporarily, and still continues of a definite duration. Hence various acts have been passed from time to time renewing the court, modifying its powers, and making various regulations. Among the rest, many

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(a) Browne v. Lee, 6 B. & C. 689; 9 D. & R. 700.

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changes have been made regarding the subject of the present inquiry.

By the insolvent act passed in the 16 Geo. III. c. 38, an insolvent debtor was discharged from all debts owing or growing due before the 22d of January, 1776. It was determined upon this act that it would not prevent an insolvent from being sued on an annuity deed for arrears accruing due after that date. For the covenant was not barred by the discharge. As to a bond, that indeed was forfeited by a breach of the condition, and if the condition were broken before the discharge, there was a debt due and owing at that time, and it was consequently barred. But if the grantee possessed both securities, the deed of covenant and the bond, he had the liberty of electing which remedy he would adopt. If he availed himself of the bond, and claimed the penalty, he was debarred from proceeding on the covenant; if he abstained from the bond, he might still sue on the covenant.^(a) In truth, the practice in bankruptcy and insolvency was quite the same as to this point, with one exception, which perhaps would not have been confirmed if it had become necessary to have it reconsidered. It has been seen above that a bond when once broken could not be re-established by a waiver of the forfeiture, so as to prevent its proof in bankruptcy; yet in *Webster v. Bannister*,^(b) it was held that the forfeiture might be waived by express agreement, and the obligor might still be sued on the bond after his discharge. The case of *Perkins v. Kempland* ^(c) was not cited, and indeed the case itself was very confused. When the bond was forfeited, and judgment was sued out thereon, the whole penalty was so far the debt due, that the court refused to reduce that sum in the Marshal's book to the amount of the arrears, though on payment to that extent the prisoner was discharged out of custody, the penalty remaining as a security for the future.^(d)

^(a) *Cottetrel v. Hooke*, 1 Dougl. 97; *Marks v. Upton*, 7 T. R. 305.

^(b) 1 Dougl. 397.

^(c) Above, page 319.

^(d) *Judd v. Evans*, 6 T. R. 396.

At the time when the last of the insolvent acts before the establishment of the Insolvent Debtors' Court was passed, the alteration in the practice in bankruptcy in regard to annuities had been introduced by the 49 Geo. III. c. 121. Accordingly that provision was also applied in the 51 Geo. III. c. 125, the insolvent act alluded to; the sixteenth section of which enacts, "That every creditor of any debtor who shall be discharged by virtue of that act for any sum of money payable by way of annuity, by virtue of any bond, covenant, or other securities of any nature whatever, may be and shall be entitled to be admitted a creditor, and shall be entitled to receive a dividend or dividends of the estate of such debtor, in such manner and upon such terms and conditions as such creditor would have been entitled unto by the laws now in force, if such debtor had become bankrupt, and without prejudice in future to their respective securities, otherwise than as the same would have been affected by a proof made in respect thereof by the creditor under a commission of bankrupt, and a certificate obtained by the bankrupt under such commission."

Two years after this act had passed, the court for the relief of insolvent debtors was established by the 53 Geo. III. c. 102. Among other regulations the above clause was re-enacted in section twenty-one, with this addition, "Subject nevertheless to the terms of the engagement of such prisoner for future payment of his or her debts, in case such person should become able to pay the same as herein-before directed." This proviso referred to the method by which an insolvent was required to charge his future estate. That act was renewed by the 1 Geo. IV. c. 119, in the tenth section of which this same provision is introduced, but after stating that the annuity creditor shall be entitled to prove as in bankruptcy, it continues, "The amount upon which such dividend shall be calculated, and the terms and conditions on which the same shall be received being first settled by the court, and without prejudice in future to their respective securities," as before. It must be observed that these acts only give the annuity creditor a right to prove

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Under the modern acts.
Corresponds with that in bankruptcy.
51 Geo. III.
c. 125. s. 16.

53 Geo. III.
c. 102. s. 21.

1 Geo. IV
c. 119. s. 10.

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7 Geo. IV.
c. 57. s. 51.

against the insolvent's estate, and to take dividends on the amount of the value, as had been introduced in the case of bankruptcy. But in the 7 Geo. IV. c. 57, by which this act was continued, and which is also renewed by the 1 Will. IV. c. 38, 2 Will. IV. c. 44, the language is altered, and it is enacted in the fifty-first section "That the discharge of any such prisoner so adjudicated as aforesaid, shall and may extend to any sum or sums of money which shall be payable by way of annuity, by virtue of any bond, covenant, or other securities of any nature whatsoever, and that every person or persons who would be a creditor or creditors of such prisoner, for such sum or sums of money, if the same were presently due, shall be admissible as a creditor or creditors of such prisoner, for the value of such sum or sums of money so payable as aforesaid, which value the court shall, upon application at any time made in that behalf, ascertain, regard being had to the original price given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of filing such prisoner's petition, and such creditor or creditors shall be entitled, in respect of such value, to the benefit of all the provisions made for creditors by this act, without prejudice nevertheless to the respective securities of such creditor or creditors, excepting as respects such prisoner's discharge under this act." There is no reference, as in former acts, to the practice in bankruptcy, but the provision is copied from what had been prescribed by the 6 Geo. IV. c. 16. s. 54. Here also the person of the insolvent debtor is expressly saved, for the discharge is directed to extend to the insolvent annuity debtor.

Decisions on
these acts.

Upon these acts some cases have occurred in the superior courts which must be noticed, because they have established that though there cannot be a direct proceeding against the insolvent, yet, as formerly in bankruptcy, he may still be liable through his surety. In two cases, indeed, the Court of Common Pleas have holden the grantor discharged from the action of the grantee, both of which

occurred upon the 51 Geo. III. c. 125. In one, *Cowley v. Russell*,^(a) the insolvent being arrested by the grantee for arrears accruing subsequent to his discharge, was discharged out of custody on an application to the Court of Common Pleas. In the other, *Mence v. Graves*,^(b) the same court shortly after held that a plea of a discharge under that act was a bar to an action of covenant brought by the grantee. But in the above case of *Cowley v. Russell*, Mansfield, C. J. in his judgment says, referring to the sixteenth section of the 51 Geo. III. c. 125. "The words, without prejudice to their respective securities, are very obscure, but they may mean that if a man has any specific security on land, it shall not be taken from him, or if he has sureties that they should not be discharged." The surety, therefore, not being also discharged, might be sued by the grantee, and was compellable to pay the accruing payments. It was then determined, in a case which came before the Court of King's Bench against the above defendant *Russell*,^(c) that he was bound to repay to the surety such sums as he had been so compelled to pay to the grantee, and the discharge was no bar to such an action. *Le Blanc, J.* observed, that the 51 Geo. III. says, that the creditor shall be entitled to be admitted a creditor, but it does not say that the debtor shall be discharged in the same manner as if he had been a bankrupt. In *Welsh v. Welsh*, as already shown,^(d) the grantor was not discharged from his surety by his certificate before the last act. It matters not that the annuity creditor comes in and proves for the value of the annuity, still the surety can proceed against the grantor's person, and therefore the Court of Common Pleas refused an application to discharge an insolvent debtor out of custody who had been discharged under the 1 Geo. IV. c. 119, and had been subsequently arrested by his surety.^(e) The cases of *Welsh v. Welsh*, and *Flanagan v. Watkins*, in bankruptcy, were held to be

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(a) 4 Taunt. 460.

(b) *Ib.* 854.

(c) *Page v. Russell*, 2 M. & S. 551.

(d) p. 321.

(e) *Freeman v. Burgess*, 4 Bing. 416; 1 M. & P. 91.

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conclusive against him. Yet, where one was alleged to be a surety for the grantor of an annuity had obtained his discharge under the 1 Geo. IV. c. 119, and inserted the bond in his schedule, it was held by the Court of King's Bench that he could not be arrested for arrears accruing subsequently, as it did not appear by the bond that he was only a surety. (a)

In the 7 Geo. IV. c. 57, a different language is used, as it is there enacted that the insolvent shall be discharged, and there is no express reference to the practice in bankruptcy. Yet the Court of Common Pleas have held that an insolvent debtor is liable to a surety who after the discharge pays a debt due before, which he had guaranteed. (b)

An insolvent is still liable through his surety.

The present effect of these decisions is certainly to keep the insolvent liable through the circuitry of his surety's action, while he is relieved from the direct liability. As all his property, as well present as future, is by his assignment vested in his assignee, the objection to this continuing liability seems stronger than in the case of bankruptcy. If, therefore, the attention of the legislature should be drawn to this subject, it may be expected that similar provisions to those already made in the last bankrupt act will be extended to insolvent debtors.

Effect of the insolvency in other cases where the acts do not apply.

Hitherto have been considered those cases only where the insolvent is relieved under the provisions of the different acts, but it must not be forgotten, that though no relief should be sought by the debtor from the Insolvent Debtors' Court, yet his estate may be placed, either by his own conduct or by the direction of a court of equity, in a course of distribution. Difficulties have been found in the determining the value of the grantee's debt, or the surety's liability, so as to settle to what extent that charge should come in competition with the other creditors. (c)

How the value is estimated in a court of equity.

In *Franks v. Cooper* (d) it is said to have long been a rule in equity, when assets are administered which are defi-

(a) *Collins v. Lightfoot*, 5 B. & C. 584; 8 D. & R. 339.

(b) *Powell v. Easom*, 8 Bing. 23.

(c) *Toulmin v. Price*, 5 Ves. 239.

(d) 4 Ves. 763.

cient, to set a value on the annuity at the time of the death, and the grantee will be allowed his share on that value. Where there is an excess of assets the grantee may then receive his arrears subsequent to the death, and in one case even fifteen years' arrears were allowed,^(a) but never in competition with other creditors. Where the annuity has been secured by bond, the Lord Chancellor held, in *Mackworth v. Thomas*,^(b) that the arrears could not be allowed as against other creditors beyond the amount of the penalty. He observed, "I cannot put a larger sum in the bond than the parties. I do not know what I might do against the party, but in the administration of assets I should injure all the creditors." In a late case,^(c) however, the rule is stated by the Vice Chancellor to be this, that where there is a distinct agreement that a thing shall be done, as the payment of an annual sum, notwithstanding it appears in the form of a bond with a penalty, the court will consider the recital in the condition of the bond as evidence of the agreement, and will not limit the relief it gives to the amount of the penalty. Accordingly he held the annuitant, who had received the penalty entitled to relief, for additional arrears.

But the arrears have been held to be recoverable to the extent of the penalty by a surety who redeemed the annuity by purchasing the bond, which secured it, while the arrears were yet below the amount of the penalty. The Master of the Rolls considered that the penalty of the bond was legally the amount of the obligee's debt, and though that may be reduced in equity to the sum naturally due, yet in this case there was no equity in reducing it below the penalty, which had been fully incurred.^(d)

In marshalling debts or legacies, a voluntary annuity is postponed to all debts, but is payable before legacies.^(e) And where a man devised an annuity, which he secured on his lands to his wife, and then charged the same with the payment of his debts, it was held that these should have

(a) *Hough v. Riley*, cit. 4 Ves. 763. (c) *Jewdine v. Agate*, 3 Sim. 129.

(b) 5 Ves. 329.

(d) *Butcher v. Churchill*, 14 Ves. 567.

(e) *Cray v. Rooke*, C. T. T. 153.

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priority to the widow's annuity, though that devise stood first, for it was but a legacy. (a) If the annuity were devised in satisfaction of dower, perhaps some question might arise as to the priority.

Where a woman produces an annuity against an estate distributable in Chancery, to which it is objected that it was either granted voluntarily or *pro turpi causa*, the proper course is to refer it to the Master to inquire into and report upon the consideration. (b)

It is worthy of remark here, that if an annuity be bequeathed by will, it is now to be considered as a general legacy, and not a specific bequest, consequently it will abate proportionably with the other legacies in case of a deficiency of assets. There had been formerly (c) a different opinion upon this subject, but it was corrected by Sir Jos. Jekyll, in *Alton v. Medlicot*, (d) and by Lord Hardwicke, in *Hume v. Edwards*, (e) and *Lewin v. Lewin*. (f) But still, if there be an intention on the part of the testator that the bequest shall be specific, this general rule shall not prevail. And accordingly in that last case it was held that an annuity bequeathed by a man to his widow and children, who were otherwise unprovided for, should be preferred to legacies to strangers, and should not abate. So also where the annuity is bequeathed in satisfaction of an existing right, as a right to dower, there shall be no abatement required on a general deficiency of assets. (g)

Two rents were devised to different persons, of the same amount, and were charged on the same land, with similar powers of entry. The land was insufficient in value to pay both, and one devisee brought an ejectment, and obtained possession. The other brought a bill to have an account of the profits, and that a moiety should be set apart to satisfy his annuity, which was decreed. (h)

(a) Foly's C. 2 Freem. 49; 2 E. C. A. 459.

(b) Hunt v. Maunsell, 1 Dow, P. C. 211.

(c) 1 Ves. 133.

(e) 3 Atk. 693.

(d) Cited in Hume v. Edwards.

(f) 2 Ves. S. 415.

(g) Davenhill v. Fletcher, Amb. 244.

(h) Eure v. Eure, 1 E. C. A. 115.

After these several enactments, providing that the value of an annuity shall be the subject of proof, it may not be improper to consider more at length the subject of the valuation. There have already been several occasions for observing that an annuity is a matter which fluctuates in value as much as any article of commerce; and though, from observations upon the duration of lives, general rules may be deduced for average values, yet particular cases can seldom be wholly guided by them. In truth, the circumstances of each separate case require to be carefully considered before a correct determination can be obtained. Hence it has been found difficult to settle the true value, and much doubt has arisen as to the proper mode to be adopted. It has been said, that commissioners of bankrupts, or other persons who are called upon to estimate the value, should attend to the sum originally paid for the annuity, and the time for which it has been enjoyed. Lord Eldon admits that that is right, but says it requires consideration how far such evidence is to operate. "The actuary, on the other hand," as he continues to observe, "proceeds on a different principle, taking the price of an annuity of that value for the life of a man of that age, without any regard to the price paid, the time of the enjoyment, or the nature of the security." In the case (a) before him, an annuity of 800*l.* had been purchased for 8000*l.* on the life of a man aged thirty-two, and in an infirm state of health. The annuitant recovered, and the grantor becoming bankrupt, the grantee desired to prove for the value of the annuity. The question then arose as to what amount should be allowed. The commissioners proceeded as already mentioned, while the grantee claimed the amount settled by an actuary, who estimated it at 10,000*l.* Lord Eldon considered the case at great length, and did not fix any general rule; for, in part of his judgment, he says, "I am unable to find that either the commissioners or the masters have any fixed practice in respect to this subject;"

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Mode of estimating the value.

(a) *Ex parte Thistlewood*, 1 Ro. B. C. 292; 19 Ves. 235.

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yet, as he considered that this case was a particular bargain between the parties, not proceeding upon the general market price, nor any certain rules, he referred it to the master to set a value upon the annuity under all the circumstances of the case. The master reported the value to be 10,000*l.* upon an actuary's calculation. Which report, on exception, the Lord Chancellor confirmed, confining his judgment, however, to the special circumstances.

It was shortly after attempted to introduce a new matter for consideration in estimating the value, namely, the price stipulated for redemption; and this point was brought before Lord Eldon in *Ex parte Whitehead*.^(a) This case of *Ex parte Thistlewood* having been cited, he said, "that was decided on circumstances which could not establish any principle generally applicable to this subject. The greatest uncertainty prevails both in the master's office and before commissioners, some of them proceeding upon the amount of the price, deducting the time of enjoyment; others upon the value at the time of the death, or at the bankruptcy." Afterwards he observed, "Three different modes have been adopted: 1st. the price paid; 2d. the price qualified by the time of enjoyment; 3d. the redemption price. But the redemption price cannot be the criterion of value. The redemption price is fixed with reference to a contract to redeem, not on contemplation of insolvency. It proceeds upon a supposition, false in fact, that the annuity is to remain independent of all the variation which may affect it, both with reference to the time of enjoyment and the falling of the lives for which it is limited. Taking the price as the criterion of value, it is not improbable that what may be considered as a fair price by the contracting parties at the time may be subsequently considered by them to be and may, in point of fact, be an unconscientious advantage by one or other of them. Still, however, the price paid should be admitted as a strong though not a conclusive circumstance in the estimate of the value.

(a) 2 R. B. C. 358; 19 Ves. 557.

Upon the best consideration, therefore, of this subject, my opinion as to the intention of the legislature in this section of the statute, (49 Geo. III. c. 121, s. 17,) is, that where there are not any special circumstances of the case the commissioners should ascertain the value upon the basis of the original sum paid, qualified by the time of enjoyment."

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Neither can the fluctuation in the money market, arising from the depreciation or increase in the value of money, be taken into account by the commissioners. It was attempted to introduce this also into the consideration of the value, as a *special circumstance* falling within the exception stated by Lord Eldon, but the Vice Chancellor refused to admit it. (a)

The statute 6 Geo. IV. c. 16, has supplied the rule for estimating the value of the annuity in bankruptcy. In the sect. 54, which directs the commissioners to ascertain the amount of the value, they are also directed to have "regard to the original price given for such annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission." Thus, the rule proposed by Lord Eldon is adopted without the proviso for special circumstances which he had introduced. There was, indeed, nothing exclusive in the rule as expressed in this statute, and doubts were entertained whether any such were intended. But it has been determined by the Vice Chancellor that the commissioners are no longer to consider the altered state of the annuitant's health. The legislature, in his opinion, seem to have intended to exclude all such considerations, as leading to endless difficulties and subtleties, and to lay down a general rule. (b)

Rule in bankruptcy supplied by 6 Geo. IV. c. 16, s. 54.

As to the estimation of the price given for the annuity, the commissioners are to estimate the value of the property, which may have been advanced as the price to the grantor, at the time of the grant, and are not restricted to its original cost to the grantee, although there may have been an

(a) *Ex parte Webb*, 2 G. & J. B. C. 29. (b) *Ex parte Fisher*, 2 G. & J. 102.

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alteration in its value, occasioned by either local or general accidental circumstances, or by the improvement of the property. (a)

In cases under the first Insolvent Debtors' Acts, namely, the 51 Geo. III. c. 125; 53 Geo. III. c. 102; 1 Geo. IV. c. 119, the proof is directed to be made according to the mode adopted in bankruptcy. The course suggested by Lord Eldon, already noticed, should have been pursued in such instances. The statute 7 Geo. IV. c. 57, s. 51, introduces a similar direction with that which had been given in the 6 Geo. IV. c. 16, to regard the original price, deducting the diminution caused by the lapse of time from the grant to the time of filing the petition. Perhaps the following account of the practice of the court upon this subject may be not improperly introduced from Mr. Cooke's *Practice of the Insolvent Debtors' Court*, p. 148:—"An assignee," he says, "will not be justified in paying a dividend to an annuity creditor upon the presumed value of an annuity until an application shall have been made to the Court by the creditor to ascertain the value of the annuity. In such an application the Court will require to be assisted by the opinion of an actuary of one of the life insurance companies of the metropolis, which is to be taken by the annuity creditor, at his own expense. But it must not be expected that the Court will be concluded by this opinion; it will still exercise its own judgment upon the matter, and will take into its consideration, as the Act of Parliament prescribes, the original sum of money paid by the creditor to the insolvent, and such diminution in the value of the annuity as shall be caused by the lapse of time from the grant thereof to the filing of the insolvent's petition. The application by the creditor must be supported by an affidavit, setting forth the amount of the consideration paid for the annuity, the time when it was granted, and the extent of the annual payments made by the insolvent. This affidavit is to be accompanied by the opinion of the

(a) *Ex parte Fisher*, 2 G. & J. B. C. 102.

actuary, and the Court will thereon grant a rule calling upon the assignee to show cause why a dividend shall not be paid to the creditor upon such sum as the Court shall then think proper to name. This rule must be served upon the assignees, who may either object to or acquiesce in the sum specified, and the decision of the Court will be final and conclusive upon all parties."

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There is a seventh mode of determining an annuity which sometimes occurs, namely, by countermand or revocation. Where an annuity is paid, as an act of liberality and free will on the part of the grantor, gratuitously and without consideration, it seems in most cases to be in the power of the person from whom it proceeds to stop it at his pleasure. And hence, in a case (a) where one entitled to an office of profit directed certain annuities to be paid out of the receipts, it was held he might afterwards countermand such direction and make a fresh arrangement, the original direction being quite voluntary, although he had not reserved a power of revocation, because it was only a mere authority, which was countermandable, and it did not appear that there was any intention to make a permanent grant.

A voluntary annuity may be revoked or countermanded.

But where an annuity has been granted by a solemn instrument, so as to create a strict legal obligation, it is not revocable, though purely gratuitous, unless a power of revocation has been reserved in the grant.

Not if it be granted by deed.

Where an annuity or rent has been bequeathed by testament or devise, the bequest, not being vested before the death of the testator, is clearly revocable during his life. But these gifts are in no respect excepted from the regulations provided for the general bequests or devises of property. And, therefore, if the personal estate only has been charged by testament, any testamentary paper will operate as a revocation if so intended. But if the testator charge his realty, the rent can only be revoked by an instrument executed in the manner required by the statute of frauds. (b)

Revocation of bequests or devises.

(a) *Young v. Cottle*, 1 P. W. 100.

(b) *Buckridge v. Ingram*, 2 Ves. J. 653; *Sheddon v. Goodrich*, 3 Ves. 481; *Becket v. Harden*, 4 M. & S. 1; *Mortimer v. West*, 2 Sim. 275.

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Where the annuity is originally charged on the realty and personalty, and there is a revocation in a subsequent instrument, which, however, will not operate upon the realty, it being invalid by the statute of frauds, the annuity is not revoked as far as it affected that fund, but still remains a charge thereon, even though the personalty was charged primarily, and is now released. This was the judgment given by Lord Alvanley in the case of *Buckeridge v. Ingram*, and was supported by Lord Eldon in the subsequent case of *Sheddon v. Goodrich*, and by Sir A. Hart, Vice Chancellor, in *Mortimer v. West*.

The ordinary rules of construction also apply to devises of annuities as of other property. Therefore, where one devised land to trustees to pay his wife a rent of 200*l.* in lieu of her jointure, and afterwards mortgaged this land, his wife joining in the fine, and executed a conveyance of the same to trustees to sell and pay his debts, it was held to be only a partial revocation, so far as necessary for the payment of his debts, but the devise was good against the heir. (a)

So, if the disposition of the lands charged be altered, a rent charged thereon will not be revoked, unless there be an inconsistency or incompatibility in its continuance. Thus lands were devised to A. for ninety-nine years, determinable on three lives, and a rent of 40*l.* was charged thereon. Afterwards, the deviser leased for ninety-nine years, determinable on three other lives, reserving 50*l.* a year rent. It was held by the Lord Keeper Wright, after the opinion of the Court of King's Bench, that the rent charge was not revoked, because sufficient rent was still reserved to satisfy it. And this decree was affirmed in the House of Lords on appeal. (b)

Lastly, by
breach or per-
formance of
condition.

The last mode by which the annuity may be terminated refers to contingent or conditional grants, and may be divided into two classes:—1st. Where the condition is fulfilled, or the contingency happens; 2d. Where the

(a) *Vernon v. Jones*, Pr. Ch. 32.

(b) *Parker v. Lamb*, 2 E. C. A. 769; 3 B. P. C. 12, ed. To. See also on this subject of construction *Beckett v. Harden*, 4 M. & S. 1.

condition is not fulfilled, or the contingency does not happen.

1st. When an annuity is granted until some condition has been fulfilled, or until some event which is contingent has happened, it ceases when the condition has been fulfilled, or the event does happen. Thus, an annuity granted to B. upon condition that it shall cease when the grantor pays him a sum of money ceases on payment of that sum. So an annuity granted to A. until the birth of a child ceases when the child is born.

2d. When an annuity is to continue upon the fulfilment of a condition, or upon the event of a contingency, it determines if the condition be not fulfilled or ceases to be performed, or if the contingency should not happen. As if an annuity be granted to a widow upon condition that she live single, it ceases on her second marriage. Or if granted to A. for twenty years if B. have a child within the first ten, it would cease should B. not have a child within the time.

Though an inquiry into the doctrines relative to conditions in general, as referable to all contracts, would not be justifiable here, and no peculiarity is found attending this particular contract on this subject, yet it may not be useless to pay some attention to the interpretation and the effect which has been given to conditions upon the grants of annuities in the various cases which have come under legal investigation. From their miscellaneous nature it is not easy to form a clear arrangement, or to deduce general principles, but an endeavour will be made to classify the cases.

The first inquiry will be, has any condition been imposed or not? That may be determined by the terms of the grant, as expressed in the language of the instrument. Two cases may be noticed where the condition was held not to have been imposed.

In one, (a) a rent charge of 5*l.* a year was devised to a younger son *towards* his education and bringing up in learning, and it was held that this was not conditional.

(a) Anon. 2 Leon. 154 ; 3 Leon. 65.

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I. By the performance of condition, or the happening of the contingency.

II. By the breach of condition.

Whether any condition has been imposed or not.

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Conditions implied.

Conditions are also often implied, either from the fair import of the language of the parties, or by the rules of law as necessarily arising from the contract. In the former case the intent of the party or parties must be extracted from the whole instrument, and a judgment formed from a consideration of the object of the gift or contract. In *Molyneux v. Scott* (b) the implication contended for was rejected by the Court. There a rent charge of 25*l.* was devised to the testator's servant and his assigns for his life, and after several other bequests, it was added, that he should have no wages for his service for the time he should serve after the testator's death, by reason of the annuity thereinbefore given. It was urged that there was an implied condition that he should continue in the service after the testator's death. Lord Mansfield said, "If from the words of the will or codicil any intent should appear that the defendant should live on with the testator's wife and son, I should hold it to be clearly conditional. But no such intention appears." And the rest of the Court coincided in his judgment.

In deeds of separate maintenance between husband and wife.

In regard to the conditions implied by law, much attention has been called to the cases of annuities between husband and wife. It has already been shown to what extent these contracts are legal and valid, but certain questions have arisen from attempts which have been made to insert conditions therein by way of implication. Thus, where an annuity has been settled on the wife for her separate use, as pin-money, or otherwise, there is no implied condition that she shall live with her husband. (c) If she leave him, she is still entitled to her annuity, though he offer to cohabit with her and she refuse. Yet Lord Hardwicke, in the course of

(a) *Anon.* 2 Leon. 154; 3 Leon. 65, cited; and *Dyer*, 329.

(b) 1 Sir W. Bl. 376.

(c) *Moore v. Moore*, 1 Atk. 272.

his judgment, observed, "If a wife should elope, be guilty of adultery or a criminal conversation, or should leave her husband without any cause, and the Ecclesiastical Court can only punish her for contumacy, but she is entirely out of their reach as to any other punishment, I should think a husband right in his application to this Court to prevent her trustees from proceeding at law to recover her separate maintenance."

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Notwithstanding this opinion of Lord Hardwicke, it does not appear that any husband has hitherto succeeded in such an application.

Again: in the case of deeds for mutual separation, there is no implied condition on the parties to live chaste. In *Mildmay v. Mildmay*, (a) a husband made a settlement on his wife for her separate maintenance after marriage, and after separation, the Lord Chancellor held, that the elopement and adultery of the wife was no answer to her demand of the annuity. This was a determination of a court of equity; the same principle holds in courts of law. Thus, to an action by a wife's trustee on an annuity bond against her husband, the Court of Common Pleas refused to allow a defendant to withdraw a plea of the general issue, which he had pleaded, and plead, 1st, That the wife had committed adultery, and was living in that state; 2dly, That she had committed adultery before the grant, though the husband was ignorant thereof at the time; because such pleas, if pleaded, would not have afforded a defence to the action. (b) In a subsequent case of *Jee v. Thurlow*, (c) in the King's Bench, it was admitted that a plea of the wife's adultery would be no answer to an action by her trustee. And Lord Tenterden, in his judgment, says, "It has been decided that a plea stating the commission of adultery by the wife is not sufficient, upon this ground, that if the husband, when executing such a deed as this, thinks proper to enter into an unqualified covenant, he must be bound by

(a) 12 Ch. C. 102; 1 Vern. 53. (b) *Field v. Serres*, 1 N. R. 121.

(c) 2 B. & C. 547; 4 D. & R. 11; and *Baynon v. Batley*, 8 Bing. 256.

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it. Had he wished to make the non commission of adultery a condition of paying the annuity, he should have covenanted to pay it *quamdiu casta vixerit*."

But it was attempted to introduce a new condition as implied in the deed. The husband had covenanted not to sue his wife for restitution of conjugal rights, and she agreed to leave her children under his sole controul without any interference by her. She had sued him in the Ecclesiastical Court for restitution of conjugal rights, to which he put in an allegation and exhibits of adultery, on which a divorce *a mensa et thoro* was pronounced. It was argued that there was an implied condition on the part of the wife that she would not sue for a restitution of conjugal rights, and that as she had sued and was only defeated by her own bad conduct, the deed of separation was broken. But the plea embodying these facts was held insufficient by the Court. Holroyd, J., observed, "But it has been argued that the wife, by suing for restitution of conjugal rights, has done an act inconsistent with the deed, and that the covenant is thereby destroyed as much as if they had come together again. It is to be observed that the covenant is not limited to the period of separation. But if it is to receive that construction, that is only upon the ground that the wife when re-united with her husband would be maintained by him, and therefore it does not follow that the deed is avoided by an unavailing attempt to obtain restitution." And Best, J., began his judgment thus: "It seems that the plea in this case is not offered as an answer to the action so much on the ground of the deed being vacated by adultery in the wife as on the idea of her having put an end to the articles provided for her separate maintenance by suing for restitution of conjugal rights, I can well understand what was said in *Bateman v. Ross*, because there the wife would have had a maintenance by living again with her husband. But here the husband opposed the attempt made by the wife, who in consequence of that opposition is still in need of the maintenance which it was the object of the deed to provide." Coupling this opinion of the Court with

the determination of Lord Eldon in *St. John v. St. John*, stated above, in p. 163, it seems that it may be fairly assumed that a successful suit for restitution of conjugal rights would determine the deed, that there is an implied condition that the parties shall continue to live separate, and if that condition be once broken the deed is wholly vacated.

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There is a case, (a) however, which must be mentioned as somewhat opposed to this proposition. A husband and wife executed a deed of separation, until they gave notice of cohabitation by writing, attested by two witnesses. An action was brought against the husband, to which he pleaded an indenture executed by his wife, wherein she agreed to cohabit, and that while they did so the annuity secured by the first deed should not be payable. The Court held, that this plea was insufficient, as it was an attempt to extinguish a covenant by another, which could not be done. However, the principle urged above was not adverted to, as, indeed, the whole doctrine is of modern application.

In *Bateman v. Lady Ross*, (b) referred to by Mr. J. Best, the general effect of a reconciliation on the contract is fully admitted, but the fact of the reconciliation was not proved there.

It being ascertained that there is a condition imposed, it becomes a question, whether it be precedent or subsequent, or continuing with the annuity. This generally depends upon the instrument itself, from which the intention of the parties is to be collected; but it is also frequently determined by the nature of the consideration which induces the contract. The former cases occur principally in express conditions, the latter in implied. And the difference in the effect of these conditions is this:—If the condition, which is either precedent or continuing, and attendant upon the annuity, be not performed, the annuity which depends upon its performance also ceases, and cannot be enforced. But if it be a subsequent condition the annuity does not always

The question whether the condition be precedent or subsequent.

(a) *Gawdin v. Draper*, 2 Vent. 217.

(b) 1 Dow, P. C. 235.

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cease, but the grantor may have his remedy on the covenant which expresses it.

On the inquiry whether the condition be precedent or not, the following cases have occurred:—One Hunlock, a tailor, assigned his trade to Blacklowe, and all the benefit of his customers, and covenanted to leave off and desist from using and exercising his trade with any of these customers, and the defendant covenanted, in consideration of the performance thereof, to pay him an annuity of 100*l.* To an action by the grantee for this annuity, the defendant pleaded that the grantor had used and exercised the said trade with one of his former customers. Saunders, for the defendant, urged that the words, “in consideration of the performance thereof,” made a condition precedent, so that when the plaintiff had broken his covenant, by using his trade with one of his customers, the defendant was not bound any longer to pay the 100*l.* a year to the plaintiff. But it was not allowed. For the plaintiff’s covenant being in the nature of a negative covenant, namely, that he will not use his trade with his customers, if the words “in consideration of the performance thereof” should amount to a condition precedent, the plaintiff would never have the 100*l.* a year during his life, because it is not possible for him to perform his covenant in his lifetime. And therefore such a construction would entirely defeat the intention of the parties; for it plainly appears that their intent was, that the plaintiff should have the 100*l.* a year during his life, and therefore it is not a condition, but the defendant may have his action of covenant against the plaintiff for breach of the covenant on his part. And although it was urged that the 100*l.* a year should be paid until the plaintiff has broken the covenant on his part, and no longer, and that such was the true meaning of the parties; and when the plaintiff has voluntarily broken the covenant on his part, he seems to be content that the 100*l.* a year should not be paid any longer; yet this was overruled by the Court.(a)

(a) *Hunlock v. Blacklowe*, 2 Saun. 156; 1 Mod. 64.

Again: in *Leech v. Vere* (a) there was a covenant to pay 50*l.* a year for the separate maintenance of the covenantor's wife, provided and upon condition that she lived in such place as I. S. and I. D. should appoint and approve of. To an action on this covenant the defendant pleaded that she did not live at such place as they appointed and approved of. The plaintiff replied, that they did not appoint any place. The Court held, that the residence was not a condition precedent but subsequent, and if no place were appointed, it should be intended they approved of the place where she did reside.

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A testator bequeathed the annual sum of 100*l.* for five years, to commence from and after the legatee's marriage with the consent of the executors and trustees, if she so long lived. The first of which said annual payments he willed should begin and be made at the expiration of the first year after such her marriage with consent, as aforesaid. The Lord Chancellor King inclined to hold the executor's consent to the marriage to be a condition precedent, without performance of which the annuity would not vest. (b)

And the case of *Bassett v. Bassett* (c) may also be mentioned here, where the annuity may be said rather not to have vested, than to have been determined. A bond was given, conditioned, that the obligor would *six months after the death of B.* secure an annuity to C. as his counsel should advise at his costs, if he should require the same, or pay 300*l.* It was held, that there was a condition precedent implied, that C. should tender an assurance within the six months; for as it was to be at his costs, it was incumbent upon him to request the obligor to grant the annuity.

The former were instances in which the annuity was to commence or continue, as it was contended, on the performance of the condition. There is another case where it was

(a) *Freem.* 376; 3 *Keb.* 229, 363.

(b) *Dobbins v. Bland*, W. Kel. C. Ch. 1,

(c) 1 *Mod.* 265; 2 *Mod.* 200; *Freem.* 228.

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to cease on the performance of a certain act. This was *Osborne v. Wickenden*.^(a) There a man devised a rent charge to his sister for life, and if she should marry, then his executor should pay 100*l.* to her, and the rent should cease. It was held that the rent did not cease till the executor paid the 100*l.*

Where the consideration of the grant continues executory, the annuity continues in like manner to depend upon the execution of the consideration. When it ceases or fails, the annuity determines. This constitutes what has been termed above a continuing or concurrent condition, though certainly it seems to be sometimes considered as only another species of condition precedent. Lord Coke gives these instances.^(b) If an annuity be given for an acre of land, and the grantor be evicted, the annuity ceases; or if it be granted for tithes, and they be disturbed, or for services or professional advice to the grantor, or even a stranger, which is refused, it ceases. And Dyer^(c) cites from 9 Edw. IV. 15, that if one grant a way over his land, and for this a rent charge is granted to him, if the one be stopped the other is also. Lord Hobart in his judgment in *Cowper v. Andrews*,^(d) observing upon similar cases, says, "And in these cases the condition is not precedent, and need not be averred performed when the annuity is demanded; and these cases are within the reason of an exchange where the land given is evicted, for here the failure of counsel or service is a kind of eviction of that that is to be done for the annuity, inasmuch as he hath no means either to exact the counsel or recompense for it but to stop the annuity. And it is to be noted, that this hath so far the force of a condition, that it being denied once it doth avoid the annuity, not for that one payment but for ever."

But an annuity claimed by the rector of a church in right thereof, is not lost by the destruction of the church, be-

^(a) 2 Saun. 197; 1 Mod. 272; 2 Keb. 712.

^(b) Co. Lit. 204, a. See Sir T. Wroth's Case, Plow. 452.

^(c) Dyer, 76, a.

^(d) Hob. 41.

cause the rectory still remains, and the fabric might be restored. (a) So, also, a rent charge on land for the support of a schoolmaster is payable though none have been appointed. (b)

Where, however, a rent charge of 50*l.* was devised to be paid to the lecturer of Churchill so long as he should continue lecturer there, and attend the charge of diligent preaching there once every Sunday, if he should not otherwise by necessity be hindered; and it was also declared, that when the place of the lecturer should be void by death, removal, or other departure, the trustees might choose a new lecturer; the lecturer having withdrawn himself, and gone abroad in consequence of his debts, where he remained for several years, it was held by the House of Lords that the trustees were authorised in choosing a new one, though the duty of the former had been discharged by a deputy appointed for him during his absence. (c)

Yet, although the consideration of the grant must continue in full force, otherwise the annuity will fail, that must be understood as meaning the principal and material part of the consideration, and for which, as Lord Hobart has expressed himself, there is no remedy. For if a part of the consideration only fail, and that not a substantial part, the annuity continues to be payable, and the covenant which expressed this consideration is held to be independent, upon which the grantor may sue, and not a condition upon the grant of the annuity. In the case of *Boone v. Eyre*, (d) the plaintiff had sold to the defendant an estate in Dominica, with the negroes, under the usual covenant for a good title and quiet enjoyment, and further assurances, in consideration of a sum in gross, and a certain annuity for lives, which the defendant covenanted to pay, *the plaintiff well and truly performing every thing in the indenture of sale contained*. In bar to an action of covenant

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Unless the principal part of the condition be broken the grant continues in force.

(a) Anon. 1 Mod. 200.

(b) *Aylet v. Dodd*, 2 Atk. 238; *Attorney General v. Bolton*, 3 Anstr. 820.

(c) *Philips v. Sir J. Walter*, 2 B. P. C. 250, ed. To.

(d) 1 H. Bl. 273, n.

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for the arrears of the annuity, the defendant pleaded that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, and therefore had not a good title to convey. But this plea was held insufficient. Lord Mansfield said, "The distinction is very clear where mutual covenants go to the whole of the consideration, on both sides they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." This case has been recognised and approved of in subsequent decisions. (a) Especially in a case (b) lately decided by the Court of Common Pleas, which strongly elucidates this proposition. Thomas Cresswell, in consideration of certain covenants, assigned to H. R. Cresswell all that branch or portion of the trade of him, T. C., consisting of purchases and assignments from Scotland, and also his interest in certain salmon fisheries there, and covenanted not to interfere or act in the branch of the business so assigned. H. R. C., in consideration of the assignment and covenants therein-before entered into by T. C., covenanted to pay T. C. an annuity. The annuity being in arrear, an action of covenant was brought, to which it was pleaded, that before the arrear became due T. C. interfered and acted in the business so assigned by him. It was contended for the defendant that the covenant not to interfere with the business was a condition precedent, for that it related to the whole consideration, and not merely a part, since the conveyance of the Scotch fishery was merely ancillary to the undertaking not to interfere. But the Court held otherwise. Mr. J. Park observed, "That the engagement not to interfere in the Scotch fish business formed only a part of the consideration for the defendant's covenant. Another and most material part was the assign-

(a) *Glazebrook v. Woodrow*, 8 T. R. 875; *Rose v. Poulton*, 2 B. & Ad. 822.

(b) *Carpenter v. Cresswell*, 4 Bing. 409; 1 M. & P. 66.

ment of the Scotch fishery, and the case fell directly within the principle established in *Boom v. Eyre*." And judgment was given for the plaintiff.

When the condition is subsequent, generally speaking, the continuance of the annuity is not affected by any breach thereof, as already seen in the cases last discussed. The grantor, as there observed, is reduced to his remedy upon the covenant broken.

Yet there have been instances where an annuity has been held not to have vested, or to determine, in consequence of the non-performance of what appeared to be a condition subsequent. Thus, a testator devised a rent charge to his sister on condition that she released all claim on his estate to his executors. She lived several years without executing a release, and then died. It was held, after long argument, that admitting this to be a subsequent condition, still it ought to have been performed in a reasonable time after the testator's death, and certainly before the grantee's decease, and therefore her representative was not entitled to claim the arrears of the annuity which had accrued to her. And if, as the Court strongly inclined to treat it, it was a condition precedent, the annuity had never vested. (a) The case of *Taylor v. Popham* (b) is very similar to this, though the condition of the release was holden to be precedent.

Again : a later case occurred in the Court of Chancery. A father granted an annuity to his son till in possession of a living, and the latter agreed forthwith to take orders and accept a living. The son soon after entered into deacon's orders, and the annuity was paid for nine years, when not having taken priest's orders, and the father being dead, Lord Eldon held that the condition not having been complied with the annuity was determinable by the grantor's representatives. (c)

It will be right now to consider what has been deemed

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Breach of a subsequent condition will not determine an annuity.

(a) *Acherley v. Vernon*, Willes, 153 ; Fort. 186 ; Com. 513. See also *Earl of Northumberland v. Earl of Aylesford*, Amb. 540, 657.

(b) 1 B. C. C. 168.

(c) *Lord Kirkcubright v. Lady Kirkcubright*, 8 Ves. 51.

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to be a fulfilment or a breach of the condition. Several points arose on the ancient grants of annuities given to retain professional services, which may possibly elucidate analogous if not similar questions in modern times, when such grants are not usual. Brooke, in his Abridgment, (a) points out a distinction between the duties of a physician and of a lawyer; for he cites a case where it was decided, that if the grantor be sick and send for the grantee for his advice, and the grantee, being a physician, refuse to go and assist him, the condition is broken and the annuity is determined. But a lawyer is not bound to travel, since the grantor may notify his case to him, and he may give him his advice wherever he may be without going to the party. So it was held, a lawyer retained to render advice was not bound to sign a bill brought by the grantor to him. (b) And where an attorney gave advice to a stranger in a dispute with the grantor, not having been requested by the latter to give his advice, the annuity was not concluded. (c) In a case (d) in the 6 Hen. VIII. a replevin was brought by one Oliver against Emsonne, who avowed under a grant of an annuity with a clause of distress for his good advice and counsel. The plaintiff pleaded that Emsonne was attainted of treason, for which he was committed to the Tower of London, and kept imprisoned there for a year, during which time the grantor required his advice for various affairs, but by reason of the said judgment and imprisonment, the plaintiff could not reach the defendant for his advice. The defendant demurred, and the Court held the plea bad. For he could have given advice if the grantor had come to him, and no default of the defendant was stated in the plea. This reasoning is not altogether satisfactory, the grantor might, however, have notified his affairs to him as in the case above.

If the grantor of an annuity for service discharge the grantee from his service peremptorily, the annuity continues,

(a) Annuities, pl. 7.

(b) Mingie's Case, Poph. 136; Cro. J. 482.

(c) Plomer's Case, Dyer, 369, b.

(d) Oliver v. Emson, Dyer, 1, b.

but it seems that he may still claim his services at any future time, though this is not certain. (a)

And indeed in all cases of services the service must be duly required, otherwise the refusal will not operate as a determination of the annuity. Thus, where a tenant in common granted an annuity to his steward for holding courts, and having summoned him without his companion the grantee refused, it was held to be no forfeiture, because the summons was void. (b)

If the party to whom the service is to be rendered die before the grantee, the annuity does not determine, because the non-performance of the service arises from the act of God, which shall not prejudice any one. Thus, King Henry VIII. appointed Sir T. Wroth to be usher of the privy chamber to his son, Edw. VI., and granted him an annuity of 40*l*. By the death of the former the grantee was discharged in law from performing the service, because the dignity of the party to be served was changed, and by his subsequent death the officer was discharged in fact; yet it was held that he was still entitled to his annuity. (c) These were ancient cases; the following have occurred in modern times.

There was an agreement on a dissolution of partnership that the partner who continued the business should, in consideration of an assignment of the partnership property, including a lease of the partnership premises, secure to the retiring partner an annuity by bond, conditioned to be void on payment thereof; or in case the obligor should at any time after the expiration of the then existing lease be dispossessed of and compelled to quit the premises without any collusion, contrivance, act, or default of his own. He obtained a renewal of the lease, and then becoming bankrupt, it passed to his assignees under the assignment of his estate. It was held, that the condition was not broken, and that the annuity did not cease, for this was not such an

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(a) Bagshaw v. Earl of Shrewsbury, 1 Leo. 209.

(b) Hurleston's Case, Dyer, 376, b. Marg.

(c) Sir T. Wroth's Case, Plow. 452. See also Warnford v. Giles, Noy, 70.

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eviction or dispossession as was contemplated in the agreement. (a)

Again: a grandfather, in consideration of an annuity of 50*l.* paid to him by his son, bound himself to pay a like annuity to his grandson, in case he was not sufficiently provided for during the life of the grandfather, exclusive of any allowance from his father. The grandson obtained a place in the Ordnance Office, with a salary exceeding the amount of the annuity. The Master of the Rolls, however, held that this was not a sufficient provision within the meaning of the condition, it being an office during pleasure only, whereas a permanent provision was contemplated. (b)

But a covenant to pay an annuity till the grantee should be in the enjoyment of a benefice, which he might hold during life, of the yearly value of 600*l.*, was held to be satisfied by his induction into a living of that value, accompanied with a bond to resign in favour of either of two sons of the patron when qualified. For the party might have held for life, he might have kept the living, and forfeited the bond. (c)

A fair and liberal construction has been put on the condition where the intention appeared to warrant it. And, therefore, where a testator bequeathed annuities to his trustees for their trouble in the execution of his will, and died possessed of several houses, let out to weekly tenants, it was held, by the Vice Chancellor, that they were justified in employing and paying a person to collect these rents, and did not thereby lose their annuities. (d)

This, however, was not a case of a contract, but of a bequest. As to personal contracts of this nature, it was decided by the Court of King's Bench that the rules which govern the construction of conditions to create real estates do not apply to them, but they must be performed according to the meaning of the parties expressed in the deed. In

(a) *Holyland v. De Mendez*, 3 Mer. 184.

(b) *Peché v. Smith*, Ib. 312.

(c) *Rowlatt v. Rowlatt*, 1 J. & W. 280.

(d) *Wilkinson v. Wilkinson*, 2 S. & S. 237.

the case (a) before them, which was one of a species of life insurance, they enforced this doctrine. There one, as a member of a life insurance society for the benefit of widows and female relations, entered into a policy of assurance with the society for a certain annuity to his widow, in consideration of a quarterly premium, to be paid to the society *during his life*; and the society covenanted to him and his executors, &c. that if *he* should pay to their clerk the quarterly premiums on the quarter-day *during his life*, and if *he* should also pay his proportion of the contributions which the *members* of the society should *during his life* be called on to make, in order to supply any deficiency in their funds; then, on proof of his death, the society engaged to pay the annuity to his widow; and by the rules of the society, if any *member* neglected to pay up the quarterly premiums for fifteen days after they were due, the policy was declared to be void, unless the *member* (continuing in as good health as when the policy expired) paid up the arrears within six months, and 5*s.* per month extra. It was held, after argument and deliberation, that having died, leaving a quarterly payment due at the time of the death, the policy expired, and that a tender of the sum by the member's executor, though made within fifteen days after it became due, did not satisfy the requisition of the policy and the rules of the society, which required such payment to be made by the member himself in his life time. And in *Lord Dormer v. Knight*, (b) a husband had covenanted to allow his wife an annuity upon condition that it should cease if she should associate, continue to keep company with, or cohabit or criminally correspond with I. F. Any intercourse whatever, however innocent, was a breach of the condition.

In pleading on a conditional annuity the following rules are to be observed. That where the condition is precedent, whether to be performed by the plaintiff or the defendant, or any other person, in the affirmative or the negative, the

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(a) *Want v. Blunt*, 12 East, 183.

(b) 1 Taunt. 417.

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plaintiff ought to show it in his declaration, and aver the performance of it. But where the interest passes at once, and vests in the grantee, and is to be defeated by a condition subsequent, then the plaintiff may declare generally, without showing the performance thereof, and it shall be pleaded by him who will take advantage of the condition. Therefore, in Ughtred's case, (a) where this rule is propounded, it was decided that a declaration in annuity was good, which stated that John Marquis of Winchester, appointed the plaintiff to be the captain of Netley Castle for his life, and gave him authority to appoint a master gunner, a porter, and six soldiers; and for the consideration aforesaid, and for the better maintenance of himself and his master gunner and soldiers, in defence of the said castle, granted him an annuity which had fallen into arrear. It was contended that the plaintiff ought to have averred that he had exercised the office, and had appointed the gunner and soldiers; but the Court held this to be subsequent matter, the non-performance of which, as it would defeat the plaintiff's title, must be alleged by the defendant.

If the condition be continuing and attendant upon the annuity, it does not lie upon the grantee to aver performance. (b)

Conditional annuity granted to a charity cannot be renounced, if once accepted.

But it must not be assumed that the grantee who has accepted the conditional grant can, by relinquishing the annuity, relieve himself from the performance of the condition. In the case of charities, certainly, that is not allowed, even though there be a provision that the annuity shall be otherwise applied on any neglect or refusal on the part of the charitable institution to fulfil the condition. If the grant be for such time only as the condition should be acted upon, then it might be abandoned at any time; but not if it were granted in perpetuity, accompanied with the condition. (c)

Hitherto those conditions have been examined which

(a) 7 Co. 9.

(b) *Lovelace v. Reynolds*, Cro. E. 546; and see *Plow. C. 82*.

(c) *Attorney-General v. Christ's Hospital*, 1 Russ. & M. 626.

affect the general contract, there are others which apply to the enforcing payment, or to the securities. These will be considered in the subsequent part of the treatise, which relates to the remedies for the parties.

Thus far of the actual extinguishment and determination of an annuity or rent. But it is right to observe that a rent may be merely suspended and not extinguished, in which case it may revive and be again enforced.

A rent is said to be suspended when it is conveyed to the owner of the land, or the land on which it is charged to the owner of the rent, not absolutely or finally, but for a certain time, after which it will revive. (a)

From the case of *Peto v. Pemberton*, (b) these propositions may be deduced, that where the grantee of the rent makes the suspension, his act alone will not revive it, but where it is caused by the act of law, or by the joint act or agreement of the parties, it may revive. There one Humfrey Peto, being seised of certain land, granted a rent charge thereout to his son Humfrey, to commence on the grantor's death. His land descended to William Peto, his heir, and from him to Sir Edward Peto, who demised a parcel of the land to Humfrey, the grantee, for a term of one hundred years, by force of which lease he became possessed. Afterwards he surrendered the term, and distrained for the arrears accruing after that surrender. It was contended that the rent was extinguished by the unity of possession, and could not be revived. But it was answered, that the surrender and acceptance thereof was a determination of the lessee's interest by the act of both parties, and therefore the rent had only been suspended during the term, and was now revived. The Court of Common Pleas agreed with this opinion, and gave judgment for the grantee. It is, however, expressly stated, that as regarded third parties, if the lease had been assigned to a stranger, then the surrender would not affect his interest, and the lease would not have been determined.

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A rent may be
only suspended.

(a) By Vaughan, C. J. in *Holden v. Smalbrooke*, Vaugh. 199.

(b) Hutt. 94; Litt. Rep. 58.92; Cro. C. 101; Het. 50. 71.

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- But the rent shall be discharged and not suspended if the personal annuity be released.

When a rent is suspended, and afterwards revives, the grantee cannot claim the payments which become due during the suspension, by electing to treat the contract as an annuity during that term, nor can he charge them upon the estate after the revival. (a)

Where that which would have created merely a suspension of a rent also operates as the release of the personal annuity, the rent, it seems, is wholly discharged, and does not revive. This point is not indeed actually decided, it is only left as doubtful in *Lord North v. Butts*; (b) yet the reasoning of the reporter is strong in support of this position. There the grantee of an annuity, with a clause of distress in a certain manor, granted by the Archbishop of Canterbury, devised to the Archbishop, to retain out of this annuity a certain sum, and then devised it over; it was contended, that as far as it was personal, the devise to the Archbishop totally extinguished it, and therefore the law would relieve the land of the charge. The objection, however, was not decided.

(a) *Johnson v. Barley*, Cro. E. 861; *Dyer*, 140. a. marg.; *Cook v. Fountain*, 3 Swa. 596.

(b) *Dyer*, 139. b. See above, page 303.

CHAPTER IX.

OF THE GRANTEE'S REMEDIES.

THE last division of the subject embraces the redress and remedies which belong to the several parties to this contract; and as the grantee and grantor have their separate remedies, which will require considerable attention, it will be divided into two parts, and, first, the grantee's remedies will be treated of; and, secondly, the grantor's; this present chapter being devoted to the consideration of the former.

The remedies of
the parties.

Since the grantee generally requires to enforce performance of the contract, though occasionally there occur instances in which he seeks to avoid it, the former is what must first be examined. In such cases the remedies naturally depend upon the nature of the securities, and may be sought either legally or on an application to a court of equity.

1. Of the gran-
tee.
Legal and equit-
able.

The legal remedies resolve themselves into two classes: those which are summary, and proceed on the sole and private act of the party himself, and those which require the intervention of a court of law.

The summary remedies are the entry and taking possession of the lands charged, the retainer of money in satisfaction of the annuity, and the distress.

Legal summary
remedies.

When a rent charge is granted, the grantee has, as a necessary incident, a power to distrain upon the land, when his rent falls into arrear. But an additional power was frequently conveyed in the deed to the grantee, on default of payment, to enter on the lands charged, and to hold the possession of the same until the arrears were satisfied. In modern times, when a rent charge is granted, it is not unusual for the grantor to create a term of years, and vest

The entry on
the land in sa-
tisfaction of the
arrears.

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it in trustees, so as to give them a right of entry on default of payment.

When the grantee, in the exercise of this right, did enter, it was holden that he had a fee simple determinable on satisfaction of the arrears. (a) He had a right to take the rents and profits of the land, but might not injure the inheritance; and as he had a right of entry, if possession be denied to him, he might bring an ejectment. This was so decided in *Jemott v. Cooly*, reported in several old authorities, (b) and though in *Parkhurst v. Smith*, (c) Lord C. J. Willes expressed a doubt whether the case was good in law; yet he afterwards cited it in *Hassell v. Gouthwaite* (d) as a valid authority, to prove that an ejectment could be maintained by the grantee on such a right. He stated, however, that the Court of Common Pleas inclined to think that a demand of the rent should be made before the entry, though it was not necessary to decide this.

It was holden at *Nisi Prius* that the ejectment could not be maintained without an actual entry on the land, the common consent rule not dispensing therewith. (e)

It has been since, however, settled in a case (f) before Lord Holt, that as between landlord and tenant, on an ejectment for breach of covenant, the general consent rule will be sufficient proof of entry, and the statute 4 Geo. II. c. 28, has dispensed with the necessity of the entry altogether between such parties, but it may still be questioned whether an entry be not necessary in order to support the grantee's claim to the land in this action.

Where a rent of 20*l.* was granted, payable half-yearly, and the grantor covenanted that if the said yearly rent of 20*l.* should be in arrear for twenty days, the grantee might

(a) *Havergale v. Hare*, Cro. J. 510; Pop. 126, 147.

(b) 1 Lev. 170; 1 Saun. 112; Sir T. Ray, 136, 158; 1 Keb. 784, 815; 1 Sid. 223, 262, 344.

(c) Willes, 340.

(d) Ib. 500.

(e) *Abbott v. Sorrell*, 3 Keb. 282.

(f) *Little v. Heaton*, Lord Raym. 750; Salk. 259, and note there.

distrain, and in default of distress might enter and hold the land to himself and his heirs, it was determined that the right of entry accrued when 10*l.*, one half-yearly payment, had been in arrear above twenty days. (a) It is also decided in this case that if the rent be assigned, the right of entry passes with it to the assignee, being for the security of the payment and incident thereto. And in like manner a penalty on non-payment passes with the rent, and therefore where the grantee of a rent with a penalty devised the rent, it was held that the penalty went to the devisee as an incident to it. (b)

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The right of entry passes to the assignee of the rent.

Yet the courts of law have been more strict latterly in their construction of the instruments which contain the grant and the right of entry, and therefore it was held not to pass from the first grantee in *Hassel v. Gowthwaite*. (c) In that case one R. D. devised a rent charge to his widow during her widowhood, with power to her to enter on non-payment, and enjoy the premises charged until the arrears were satisfied; and after her marriage or death, to be paid to C., his executors, administrators, and assigns. The widow married, whereupon C. received the rent during his life, and then died without disposing of the rent, but having appointed D. his executor. It was held by the court of Common Pleas that D. had no right of entry on the non-payment of the rent to him, and therefore could not maintain an ejectment.

This right is scrutinized strictly by the courts.

According to the report of *Jemott v. Cooly*, in *Levinz, Keble, and Raymond*, this right of entry is an inheritance which would descend upon the grantee's heir; but when the entry has been made, as only a chattle interest in the land is gained, it shall pass with the arrears to the executor.

The right would descend on the heir.

Here it may be observed, that in *Havergale v. Hare* another point arose, as to the effect of a fine levied as an additional security to the grantee, after certain arrears had accrued, upon a right of entry conveyed in the original

(a) *Havergale v. Hare*, Cro. J. 510; Poph. 126, 147.

(b) *Brendloss v. Phillips*, Cro. E. 895.

(c) *Willes*, 500.

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grant. Two of the justices, Croke and Montague, thought the right was not affected thereby; but Doddridge and Haughton thought it was taken away.

When the grantor demises premises to trustees to secure the annuity out of the rents and profits, he ceases to have the legal control over the same, and though he refuse to direct the trustees to pay the same over to the grantee, the latter has no remedy against him, because he may himself give such directions. (a)

If on default of payment, the trustee enter into possession, and then all arrears be paid up, a court of equity will not order possession to be restored to the grantor except upon such terms as will enable the trustee to resume it, and receive the rents the moment the annuities may be again in arrear. (b)

By retainer.

The next summary remedy for the grantee is by way of retainer. Under the power last considered the grantee might enter on the lands rightfully, and satisfy the arrears; and even where he had entered wrongfully, as by disseisin, it was formerly held that he might recoup or retain, out of the profits of the land claimed by the disseissee, so much as would discharge the arrears due. And the reason given is, because otherwise, when the disseissee re-enters, the arrearages would be revived, and therefore, to avoid circuitry of action, the arrearages during the disseisin shall be recouped in the damages. (c)

Executors or administrators may retain out of assets for arrears and value.

There is also a right of retainer, which arises sometimes in the cases of executors or administrators; for where the grantor makes the grantee his executor, or where, in case of intestacy, the grantee obtains administration of the intestate's effects, the latter may retain out of the assets the amount of any arrears due at the time of the death, and also a sum equivalent with the value of the annuity, unless there be any penal sum already stipulated as a security. In *Plummer v. Marchant*, (d) a man, in consideration of his wife's marriage portion, bound himself to bequeath, or that

(a) *Warn v. Bickford*, 9 Pri. 43. (b) *Jenkins v. Milford*, 1 J. & W. 629.

(c) *Coulter's C. 5 Co.* 30.

(d) 3 Barr. 1390.

his executor should pay a sum of money to his wife's trustees, the interest thereof to be for her maintenance during her life. He died intestate, and one of the trustees, who was also one of the covenantees, took out letters of administration. Being sued for a debt due from the intestate, it was held he was entitled to retain this sum. So afterwards in *Loane v. Casey*, (a) in consideration of his wife's portion a man covenanted with her father to leave her an annuity, and having appointed her his executrix, and confirmed this agreement, died, and his widow proved his will. It was decided that she was justified in retaining all the testator's property, it being found that the whole was insufficient to answer the value of the annuity, and though nominally it was a debt to another, yet it was in truth a debt to herself, who was beneficially interested.

But the grantee is not allowed to retain unless the covenant be expressed to pay the annuity to him, or to trustees for him; and therefore the right of retainer was denied in a case in the Exchequer; (b) where a man covenanted on his marriage with A. B. and C. D. that his heirs, executors, or administrators, should pay to his wife, on his decease, an annuity of 20*l.*, or to the said A. B. and C. D. the sum of 400*l.*, to be and remain vested in them. He died intestate, and his widow took out administration. It was held that she was not entitled to retain that sum of money, as it was not payable to her, and did not appear by the covenant to be paid for her use.

But by far the most important remedy which the grantee possesses is the power of distraining upon the lands charged as the security; a power which, however modified by various restrictions, according to the will of the parties, forms, nevertheless, a necessary incident upon such a rent. Remedy by distress.

It is not proposed to enter at length upon the law of distresses, or the action of replevin as connected therewith, for such an inquiry would lead too far from the immediate subject, and, indeed, is unnecessary in consequence of the various excellent treatises already existing. Some particu-

(a) Sir W. Bl. 965.

(b) *Thomson v. Thompson*, 9 Pri. 464.

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How the distress
must be given.

lar points, however, will require discussion and investigation.

In the first place, then, it is to be observed, that formerly it was necessary that the power of distress should have been given in express language, and the Courts refused to allow it merely on inference. (a) If the rent was to issue out of land, the grant only created a rent seck; but since the stat. 4 Geo. II. c. 28, a power of distress is given to all rents seck granted since that act was passed, therefore there is not that necessity for an express clause of distress in the grant. It was, indeed, allowed that an insensible or repugnant clause of distress would not prevent the rent charge from being valid. Thus a rent was granted to commence after the death of Thomas and Anne, with a clause of distress during their joint lives. As this was insensible, the Court held that it might be rejected, and the distress taken after their death was legal. (b)

In some cases the law recognises the power of distress as necessarily incident to the rent without any express grant thereof; as where it is granted for equality of partition, there, says Littleton, (c) the parcener and his heirs may distrain of common right. And Lord Coke adds, (d) it is so in the case where it is granted in recompense of dower.

As the rent in these cases is not annexed to the person only, but to the estate, the assignee of the grantee may also distrain, (e) without express power.

Again: it has been holden, on the interpretation of the stat. 27 Hen. VIII. c. 10, ss. 4, 5, cited above, p. 66, that a rent granted to the use of one, as declared in the deed to lead the uses of a fine, might be distrained for by the conusor though there was no clause of distress reserved. (f) The effect of that act is to transfer to the cestui que use all the remedies which the law would give to the party who has the first seisin. And thus it was afterwards decided

(a) Anon, Benl. 11; Shep. T. 458. (b) *Graves v. Ashenhurst*, Freem. 77.

(c) Sec. 252. See also *Gilb. Distresses*, 26; 3 Co. 22, b.

(d) In the Com. on the Sec. (e) 3 Co. 22, b.

(f) *Danby v. Conyers*, Dyer, 362; 1 And. 51; Ben. 316.

that where a rent was granted to A. in trust for B. with a clause of distress, B. might distrain for the arrears, because, though the clause of distress was to the trustee, yet the statute transferred all incidental rights and remedies to the cestui que use. (a)

It is no restriction upon the grantee's power of distraining that he has also a power of entering on the lands and satisfying the arrears out of the rents and profits. For where there was a term vested in a trustee to secure payment of an annuity, with power to distrain, and the grantor continued in actual possession, it was objected that the grantee could not distrain, because the legal possession was in him. But the Court held his distress to be justifiable, and that the grantor might be considered as his under-tenant of the premises. (b) And it has been decided that a personal covenant to pay the annuity may be sued on though there be a right to distrain. (c)

Assuming that the right to distrain has been given, that right may be subject to various restrictions and conditions, according to the agreement of the parties, or the pleasure of the grantor. Some restrictions have occasioned much discussion, and must be noticed here. The rent was frequently granted with a power to distrain if it became in arrear for a certain period after demand; and this demand was sometimes to be made on the land itself, and sometimes off the land charged. This demand it was contended was a condition precedent before the power to distrain accrued, and a variety of cases were brought before the courts upon this point. Though there is some difficulty in determining the actual judgment, yet the result of an examination of the numerous references stated in the margin is this (d):—That

The right to distrain may be subject to restrictions.

(a) *Cook v. Herle*, 2 Mod. 138; 1 Mod. 223.

(b) *Fairfax v. Gray*, 2 W. Bl. 1326.

(c) *Boscawin v. Cook*, 1 Mod. 223; 2 Mod. 138.

(d) *Dyer*, 348. *Maund's Case*, 7 Co. 28. *Dennis v. Bosden*, 1 And. 253. *Wicks v. Dennis*, 1 Leo. 190. *Brown v. Dunri*, Hob. 208; Br. & G. 171. *Howell v. Sambay*, Hob. 133; Br. & G. 179. *Swynerton v. Mills*, Br. & G. 178. *Sands v. Lea*, Palm. 320; 2 Roll. R. 264, 267. *Perryman v. Bowden*, Het. 59. *Fox v. Vaughan*, ib. 89, 91. *Kind v. Ammery*, Hutt. 23. *Lamb v. West*, ib. 114. *Dethick v. Bradborn*, 2 Sid. 110, 117.

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where the demand is to be made upon the land charged, the act of distraining is itself such a demand as is sufficient, and the distress may be made without any previous act. Where the rent is payable at a place off the land charged, and a demand is required, then there is no right to distrain until such a demand has been previously made at the place appointed. And in either case where on non-payment of the rent, the payment of an additional rent was incurred, as was not unfrequent in former times, the grantee could not distrain for this penalty without having made a demand according to the requisites of the grant, and at the precise time appointed for payment, though his remedy for the rent itself was not otherwise affected.

Digression to
annuities.
Where there is
some condition
imposed upon
the mode of
payment.

Here, for a moment, a digression may be allowed for the consideration of the analogous case of annuities, where the form of the remedy is different. In *Sands v. Lea*,^(a) a distinction is pointed out between a rent and annuity in this respect; that the former being a real right, there is always some land to which the grantee can resort in order to make a demand; but the annuity being merely personal, the grantee, having no certainty where to find the grantor, cannot be compelled to make the demand before he sues. Indeed, the grantor is in the situation of any other personal debtor, it is his duty to seek out his creditor and pay him. It had been decided accordingly in *Thomson v. Butler*.^(b) An annuity was granted, to be paid at the house of the grantor, upon request, at the four usual feasts. The grantee brought a writ of annuity for rent due at such a feast. The defendant pleaded that he had not been requested. And the Court held the plea to be bad. For the granting of the annuity created a duty, and the limitation to be paid at four terms of the year is a limitation of the (mode of) payment only. And this is supported by a much later case of *Hope v. Colman*,^(c) in the Common Pleas. There the plaintiff brought a writ of annuity for an annuity of 40/., payable quarterly at the defendant's mansion house. The defendant

(a) Palm. 320. (b) *Thompson v. Butler*, Cro. E. 721. (c) 2 Wils. 221.

craved oyer of the deed, and it contained, besides the grant as set forth by the plaintiff, a covenant by the defendant to pay the annuity, (if the same be personally demanded by the said E. H.) The defendant pleaded that there was no personal demand at his house or upon him; and on demurrer these pleas were held insufficient; that the covenant was substantive and distinct from the grant, and therefore the demand not being contained in the latter, was not traversable in this action, whatever it might have been if an action had been brought on the covenant: "but" (it is added in the report) "we think it would not be traversable in that case, as it is contained in a parenthesis in the deed."

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The next point for consideration is, who may distrain. This will depend principally upon the terms of the grant, but ordinarily the party to whom the rent is granted has the power, and after assignment his assignees, whether an assignee by the act of the law or of the party. But where a rent descends upon the heir, though the power to distrain accompany it, yet he has no right to any arrears which accrued in the time of his ancestor, they vest in the executor or administrator. (a) A rent, however, granted for a term of years passes on the grantee's death to the executor, who may distrain, even though that power had been given to the heir in the grant. (b)

Who may distrain; the grantee or his assignee.

But by the common law, when a man died who was entitled to a rent for life, or in fee, the right to the distress was lost as to the arrears due at his death. Neither his executor nor heir could distrain for them, on the principle that the land was chargeable only so long as the interest of the party in the charge continued, which of course ceased on his death. This rule of the common law was evidently attended with injustice and inconvenience, and has been materially altered by the statute 32 Hen. VIII. c. 37, which recites, that "Forasmuch as by the order of the common law the executors or administrators of tenants in fee simple,

The executor of tenant in fee or for life for the arrears due at his decease.

32 Hen. VIII.
c. 37.

(a) *Rives v. C. Winch*. 48.; *S. C. Chittle v. Sammon*, Hutt. 55.

(b) *Darrel v. Wilson*, Cro. E. 645.

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tenants in fee tail, and tenants for term of lives of rent charges, have no remedy to recover such arrearages of the said rents as were due unto their testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain or have any lawful action to levy any such arrearages of rents due unto him in his life, as aforesaid; by reason whereof the tenants of the demesne of such lands, tenements, or hereditaments, out of the which such rents were due and payable, who of right ought to pay their rents at such days and terms as they were due, do many times keep, hold, and detain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents were due cannot have or come by the said arrearages of the same towards the payment of the debts and performance of the will of the said testators;" it was then enacted in sect. 1. "For remedy thereof, that the executors and administrators of every such person or persons, unto whom any such rent is or shall be due and not paid at the time of his death, shall and may have an *action of debt* for all such arrearages against the tenant or tenants that ought to have paid the said rent so being behind in the life of their testator, or against the executors and administrators of the said tenants; and also, furthermore, it shall be lawful to every such executor and administrator of any such person or persons, unto whom such rent is or shall be due and not paid at the time of his death, as is aforesaid, to *distrain* for the arrearages of all such rents upon the lands, tenements, and other hereditaments, which were charged with the payment of such rents and chargeable to the distress of the said testator, so long as the said lands, tenements, or hereditaments continue, remain, and be in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent so being behind to the said testator in his life, or in the seisin or possession of any person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant, by purchase, gift, or descent, in like manner and form as their said testator might or ought to have

done in his life, and the said executors and administrators shall for the same distress lawfully make avowry upon their matter aforesaid."

Two remedies are now given to the executors or administrators in this case, namely, an action of debt, and a power of distress, of which Lord Coke remarks (a) the latter is much the plainer and more certain remedy, as the action of debt is only to be brought against those who took the profits, their executors or administrators, while the distress may be taken upon the lands, be it either in the tenant's own hands or in the hands of any other that claimeth by or from (that is, under) him by purchase, gift, or descent.

Upon a statute so ancient and so extensive in its application, of course many questions have arisen, but none which depended upon any distinction between these two remedies. As it will, therefore, be only necessary to examine the cases once, they will be introduced here under the subject of the distress, to which reference can easily be made when the action of debt is treated of.

At first it was holden that the statute only applied to give the remedy to executors of tenants for life, or fee of rents, where there was none before, and that where a rent was granted to one for ninety-nine years, if he should so long live, his executor had no right to distrain for arrears due at his death, because he had a remedy at the common law already by an action of debt. (b) The same opinion is also expressed in Buller's N. P. p. 57, as decided in *Pool v. Duncomb*, T. 1657. This case, however, is reported in 2 Sid. 28. under the name of *Pool v. Neel*, where this position was urged by the counsel in argument, but the court gave no judgment upon it. However, in *Hood v. Bell* (c) this general interpretation has been denied, and it was determined that the executor of the tenant for life might *distrain* for the arrears of a rent due at the testator's death, though no doubt he had an action of debt at the common law. This opinion, as laid down in *Croke*, was pressed upon the

Construction of this section. It is not confined to cases where there was no remedy previously.

(a) Co. L. 162. b.

(b) *Turner v. Lee*, Cro. C. 471.

(c) 1 Lord Ray. 172; 3 Salk. 136.

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court, but was not admitted: "for it was observed by the court, this act of 32 Hen. VIII. is a remedial law, and shall extend to the executors of all tenants for life, and the law has been taken so always since the statute, and never been questioned, and the words of the statute are general enough to extend to all. And in 3 Cro. 332, *Lambert v. Austin*, this seems to be admitted, and therefore the rule in Cro. C. 471, so generally taken, cannot be law."

Tenant by elegit
is not within it.

Where a judgment creditor takes in execution a rent of which the defendant is possessed for life, and the grantee dies before the judgment is satisfied, the plaintiff cannot distrain for the arrears due at his decease under this statute. Such was the opinion of Glyn, C. J., and Warburton, J., against *Newdigate*, on the ground that this case was not mentioned in the statute, and that the plaintiff was not in by the party but by an act of parliament; at the same time there was still a remedy, for he might have an action of debt, (a) which last expression no doubt lead to the opinion in *Buller's Nisi Prius*.

A devisee is

In the argument in this case a decision in 43 Eliz. was cited in the case of *Royen v. Danglee*, where it was held that a devisee of a rent was within this statute, and might distrain, which seems to have been *Gawan v. Ramtes*, Cro. E. 804; and *Moore*, 625.

Husband for
arrears of wife's
rent, 32 Hen.
VIII. c. 37.
s. 3.

As to the case of a husband's claim for the arrears of his wife's rent, that is provided by the third section of the same statute, wherein it is enacted, "That if any man which now hath or hereafter shall have, in right of his wife, any estate in fee simple, fee tail, or for term of life, of or in any rents, and the same rents now be or hereafter shall be due, behind, and unpaid, in the said wife's life, then the said husband, after the death of his said wife, his executors, and administrators, shall have an *action of debt* for the said arrearages against the tenant of the demesne, that ought to have paid the same, his executors, or administrators; and also the said husband, after the death of his said wife, *may distrain*

(a) *Pool v. Neel*, 2 Sid. 28. 62.

for the said arrearages in like manner and form as he might have done if his said wife had been then living, and make avowry upon his matter, as aforesaid," so that the husband himself shall have the two remedies of the action of debt and the distress, but his executors shall have the action only.

Upon this section it has been determined that a husband can claim and recover after his wife's death not only the arrears which accrued during the marriage, but also those due before her coverture. This was decided in a case of *Sharp v. Pool*, reported at length by Coke from Serjeant Bendloes, in Ognell's C. 4 Co. 51 a.(a) It was admitted that the husband had a right to the arrears accruing during the marriage, and that he might have an action of debt for them at the common law, though not for the others. But it was objected that as the executors of the wife might have had an action for the arrears due before marriage at the common law, and the statute did not propose to give any remedy where there was one already existing, nor to take away a remedy from one to give to another, the husband could not maintain any claim to these arrears. And again, by the words of the act, the remedy is given to the husband for the arrears *due in the said wife's life*, whence it was inferred that it only meant to apply to arrears incurred while she was a wife, and not before. But it was unanimously resolved that the husband should have the said arrears, for as to the arrears during the coverture, since the common law gave him a remedy for them, in order to give any effect to the words of the statute, they must be construed as applying to arrears due before; and as to the use of the word "wife," it was only intended to designate and describe the condition of the woman, and not to imply that the arrears should incur during the coverture.

Indeed the husband's interest in these antenuptial arrears is such, that if he be made defendant alone, he may solely avow them as due to his wife before marriage, and cannot

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thereon.

Husband's in-
terest in his
wife's prenuptial
arrears.

(a) S. C. 1 And. 47; Benl. 33.

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make cognizance for them as her bailiff; (a) and where a distress had been taken for the arrears due before marriage, which had been rescued, it was held he could maintain an action of rescous in his own name, although he might have joined the wife's name, she being the meritorious cause of the action: (b) and husband and wife may avow jointly for the arrears due to the latter before her marriage, as for rent due to both, and it is not necessary to state it to have been due to her while sole. This was decided on a writ of error. (c)

Wife's claim to
arrears on her
husband's
death.

In regard to the wife's claim to arrears on her husband's death, where the husband was the sole grantee, of course she can only claim if she be his executrix or administratrix; but where she was a joint grantee with him, she is entitled to distrain for the arrears then due in her own name and right, (d) although, if she distrain as administratrix, it will not be material; (e) and if she die before the arrears are recovered, it seems her administrator or executor may distain not only for the arrears accrued during her widowhood, but for what were due at the death of her husband. (f)

The 32 Hen.
VIII. c. 37, s. 4,
gives a remedy
on the death of
the annuitant.

These former sections of the statute apply only to the arrears due on the death of the grantee; but there is also a further provision in the fourth section for the arrears which may be due at the death of the annuitant who is not the grantee, where it is enacted, "That if any person or persons which now have or hereafter shall have any rents *for term of life or lives of any other person or persons*, and the said rent now be or hereafter shall be due, behind and unpaid, in the life of such person or persons, for whose life or lives the estate of the said rent did depend or continue, and after the said person or persons do die, then he unto whom the said rent was due, in form aforesaid, his executors or ad-

(a) *Duke of Albemarle v. Cutler*, 3 Keb. 697.

(b) *Fenner v. Plasket*, Cro. E. 459; *Moore*, 422.

(c) *Bowles v. Poor*, Cro. J. 283; 1 Buls. 135.

(d) *Brown v. Dunri*, Hob. 208; 1 Br. & G. 171.

(e) *Ib.*

(f) *Temple v. Temple*, Cro. E. 791; *Egerton v. Sheaf*, Lutw. 1151.

ministrators shall and may have an *action of debt* against the tenant in demesne that ought to have paid the same when it was first due, his executors and administrators; and *also distrain* for the same arrearages upon such lands and tenements, out of the which the said rents were issuing and payable, in such like manner and form as he ought or might have done, if such person or persons by whose death the aforesaid estate in the said rents was determined and expired, had been in full life, and not dead; and the avowry for the taking of the same distress to be made in manner and form aforesaid."

Where the grant of the rent was to one and *his heirs* during the life of A. B. it was held to be within this section, and that the grantee might distrain for the arrears, although it was *quasi a fee*. (a)

But against whom does the act give the remedy? It will be observed that there is a distinction between the language of the different sections. In the first, the action of debt is given against the tenant that ought to have paid the rent when it fell into arrear, his executors or administrators, and this remedy is the same in the other sections; but the right to distrain granted by the first section is upon the lands chargeable so long as they continue, remain, and be in the seisin or possession of the tenant in demesne, who ought immediately to have paid the rent, or of some other person claiming the same only by and from the same tenant by purchase, gift, or descent. In the third and fourth sections it is simply upon the lands out of which the rents were issuing and payable. The language of these latter sections is clear and distinct, and the distress under them is not affected by the interpretation which the former section may have received. It was attempted in an early case (b) to interpret the fourth section by reference to the first; but it was not allowed by the court; and it was held that one in remainder was liable to the grantee's distress after the death

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Against whom
the act gives the
remedy.

(a) *Gawan v. Ramtes*, Cro. E. 804.

(b) *Edrich's C.* 5 Co. 118; *Co. L.* 162. b.

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of the annuitant when the arrears had fallen due, before the determination of the previous estate. The case itself was this: A., seised in fee of land, devised a rent charge to B. for the life of C. A.'s heir demised the land to D. for life remainder to E. in fee. The rent became in arrear during D.'s life, who died, and C. after him, and then the grantee distrained upon the remainderman, which distress was held lawful.

Interpretation of
the first section.
The tenant's
feoffee and his
feoffee are within
it.

But on the words of the first clause there have been various questions. In an anonymous case in 1 Leon. 303, (b) it was moved to the Court, that if A. grant a rent charge to B., the rent is behind, B. dieth, A. enfeoffeth C. of the lands in fee, who divers years after enfeoffed E., and it was holden by Walmesley, Periam, and Windham, J.'s, against Anderson, C. J., that E. should be chargeable with the said arrearages to the executors of B. This decision is also adopted by the Court in Ognell's Case, (c) where it is said, "And therefore the second feoffee, and so over in infinitum, shall be charged by force of this act, for what reason will there be to bind the first feoffee and not the second feoffee, and so of all others? And what reason will there be to bind only the immediate heir, who shall have it by descent, and not any other mediate heir? For otherwise, as to this point, the statute will serve to little purpose, especially when the first feoffee may alien the land at his pleasure, and all the sons of Adam are subject to death." The report then goes on to explain some of the other words of this section. "Some also conceived that the second feoffee is within the express words of the act; for although he is not in 'by the grantor,' yet he is in 'from him,' for 'from him' amounts to as much as 'under him.' And the word 'and' in this case shall be taken for 'or;' and this word 'only' was added only to this purpose, *that he ought to claim only under the tenant in demesne and not paramount.* As if tenant in tail makes a feoffment in fee and dies, and the discontinuee charges the land with a rent

(a) And 3 Leo. 263.

(b) 4 Co. 50, b.

in fee, and afterwards enfeoffs the issue in tail within age, so that he is remitted, in that case 'only' has its operation, for now the issue claims by title paramount; but if the tenant makes a feoffment in fee to the use of another, in that case cestui que use doth not claim only by the feoffor, but also by the statute, and he is not in the per, and yet he claims under the feoffor, and that was the intent of the act. So, if the tenant makes a gift in tail, and the donee dies, the issue in tail is within this statute, for he claims 'only' under the title and estate of the tenant in demesne, although he does not claim only by descent, but also per formam doni. So if tenant in tail be the remainder over in fee, the issue in tail is within this statute, against the opinion in *Plow. Com. in Manxel's Case*, 4, b." And, accordingly, it seems to have been admitted by the Court in the reign of Queen Elizabeth, that where one seised in fee granted a rent, and then conveyed the land charged in tail, the tenant in tail in possession was liable for arrears accrued in the lifetime of his predecessor the first donee in tail. (a)

Tenant in tail
is bound.

But a subsequent case is not altogether in accordance with this decision, or the last opinions reported by Lord Coke. In *Lord Fairfax v. Lord Derby*, (b) the Lord Chancellor held that issue in tail who claim not under but paramount are not liable to the distress. "It is true," he says, "while the rent charge was continuing the issue in tail was liable to be distrained for the whole arrear which had been incurred in the lifetime of his ancestor, but that was summum jus, and the new remedy given by the statute doth not carry it so far." Therefore, in that case, where one tenant in tail suffered a rent charge to which the estate was subject, payable to Lady Derby, to fall into arrear, and then died, relief in equity was refused to the executor of Lady Derby against the succeeding tenant in tail for these arrears, the party being left to his remedy at law, if there were any.

It was held by the King's Bench, apparently on error

(a) *Sir W. Cordell's Exors. v. Clifton*, 2 Leo. 152; 3 Leon. 59.

(b) 2 Vern. 612.

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Question as to
copyhold lands.

from the Common Pleas, that the grantee of an escheated copyhold was not liable to be distrained on for the arrears of a rent charged on a manor, because he did not claim the possession by and from the tenant who ought to pay it only, but also by the custom, which was paramount. (a)

In Coke's Copyholder, Supp. s. 21, this case is cited under the title "Copyhold lands not within the statute 32 Hen. VIII. of rents." Lord C. B. Gilbert (b) combats this general position, and points out the difference of opinion between the Courts of Common Pleas and King's Bench upon this point. He thinks the judgment of the latter court erroneous, but at all events it does not warrant the position that copyholds are wholly excluded from the act. At the same time, in *Appleton v. Doily*, (c) it was held, that the statute did not apply to copy rents, but to rents out of free land.

The tenant in
possession of the
land is liable.

The point which was actually considered in *Ognell's* case was this:—One seised of a reversion in fee, after a term of thirty years, granted a rent in fee, which was in arrear when the term expired. The grantor made a feoffment in fee of the land charged, the grantee then died, and the feoffee demised the land at will. It was adjudged that the grantee's executor might distrain upon the tenant at will for the arrears of the rent due before the expiration of the term; for that the tenant of the feoffee claimed by and from the party liable within the meaning of the act.

There is also a case of *Lambert v. Austin*, (d) which must be noticed here, though the question raised in it was not decided. One seised in fee granted a rent charge to A. for life, then demised the land to B. for years, and granted the reversion to C. for life. The rent being in arrear, the grantee died, having made the defendant his executor. Then the term having expired, the remainderman entered,

(a) *Sanda and Hampstone's Case*, 2 Leo. 109.

(b) Ten. 187.

(c) *Yelv.* 135; 1 Br. & G. 102. Mr. Watkyns, (2 Cop. 182, 195,) expresses a doubt on this subject.

(d) *Cro. E.* 332; *Owen*, 117.

and the grantee's executor distrained for the arrears. The Court were divided in opinion whether this distress was lawful. It was contended on one side that the termor, who took the profits of the land, was the tenant answerable for the rent, and as the remainderman did not claim from him, but paramount, he was not liable to the distress. On the other side it was said that the freeholder was the tenant within the meaning of the act, for he alone could give seisin of the rent, would be liable in an assize, or could receive a release, and therefore the remainderman who claimed from him was liable.

When executors avow for the arrears of a rent due at the testator's death, they must aver that the land continues in the seisin of the tenant in whose time the arrears accrued, or those who claim under him, though they need not show how he is seised, for that may be mischievous to them who are strangers to his title. (a)

It is obvious that there is no provision in the act which will extend the remedy to any estate, over which the grantor could not exercise a controul. Hence, in addition to what has been observed with reference to a tenant in tail, it may be added, that it was agreed in the anonymous case (b) above referred to in Leonard, by all the justices, that the lord on escheat, tenant in dower, or by the curtesy, should not be charged, because they do not claim to be in by the party only, but also by the law. And Lord Coke adopts the position as regards the lord on escheat. (c)

No estate is charged thereby which the grantor had not a controul over.

Neither can the representatives distrain for the arrears of any rent under this statute, to which the testator or intestate would not have been entitled. And therefore it was agreed by the whole Court, that if A. has a rent in fee or for life, and the rent is in arrear, and afterwards A. grants over the rent to another, and the tenant attorns, and afterwards A. dies, his executors are not within this branch, for by the said grant over, the arrearages were lost, and were not due to the

The representatives cannot distrain where the testator had ceased to be entitled.

(a) Myles v. Willoughby, Cro. E. 547.

(c) Co. L. 162.

(b) Anon. 1 Leo. 303; 3 Leo. 263.

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testator at the time of his death, as the statute speaks. The act gives no remedy when the testator by his own act has dispensed with the arrears, but when they were due to him at the time of his death, and by the act of God become remediless. (a)

Vaughan, C. J., afterwards, in a judgment upon the case of *Dixon v. Harrison*, (b) expresses his assent to this resolution of the Court. "The grantor," he says, "is without remedy for the rent arrear before his grant, for distrain he cannot, and other remedy he hath not, because all privity between him and the tenant is destroyed by the attornment to the grantee, and he hath no more right to come upon the land than any stranger. And a regrant back to the original grantor, and a new attornment on the part of the tenant, will not give him a right to distrain for the arrears." But in the case then before him it was decided, that if the grantee of a rent in fee levy a fine to the use of himself and his wife in tail, he may still distrain for the arrears due before the fine was levied. It seems, however, that an assignment of the rent after a distress had been levied will not affect the grantee's right to avow in replevin. (c)

A distinction has been made between the cases where the rent was extinguished by the party's own act, or the operation of law, and where particular estates in rents expire or determine. The arrears in the former instances may sometimes be recovered by an action, as the real right may be turned into personalty, though the right to distrain be lost. (d) Upon this principle it has been thought, that if a rent be granted for the due discharge of an office, the grantee cannot distrain for the arrears after he has ceased to exercise the office, though he may have an action of debt. (e)

How joint
grantees should
distrain.

Thus far as to the representatives of the grantee. Somewhat remains to be said as to joint grantees, with regard to whom the following observations may be made. Where the rent is held in coparcenary, the distress should be made in

(a) *Ognell's Case*, 4 Co. 50.

(b) *Vaugh.* 40 ; *Wetherhead v. Harrison*, Sir Tho. Jon. 2. S. C.

(c) *Lawson v. Cook*, March. 103.

(d) *Ognell's Case*, 4 Co. 48.

(e) *Dyer*, 270, pl. 23.

the name of all, and the avowry should be joint for the whole rent. (a)

Tenants in common may make separate distresses for their separate shares, and if there be one distress for the whole, they must sever in their avowries for the same. (b)

It is not quite clear that a joint tenant can distrain for his own share, because his interest is undivided, yet if he distrain for the whole, which he certainly may do, he must avow for his own interest only, and make cognizance for his companions, since, it is said, the avowry is in law in the nature of an action and a demand of the rent, and being on the right, which is in all, the Court could not adjudge a return of the goods to him alone. (c) The survivor of two joint tenants may distrain for all the arrears due at the death of his companion. (d)

The coparcener and joint tenant who distrains may appoint a bailiff to distrain for the whole rent without the assent of the others, though perhaps it would be different if there were an express dissent. (e)

Now as to the mode and manner of making the distress. This will for the most part correspond with the course of proceeding where rent is reserved on leases, though there are a few points in which there is a difference. The mode and manner of making the distress.

First, with reference to the property taken. C. B. Gilbert (f) says:—For a rent charge the grantee cannot distrain a stranger's beasts until they are levant and couchant. For this rent doth not stand upon a feudal title as the rent service, but it is said to be against common right; and therefore the stranger's beasts must be so long resident on the lands out of which the rent charge issues that notice may be presumed to the owner of them; that is, they must

(a) Osmer v. Sheaf, 2 Lutw. 1211. Page v. Steadman, Carth. 364; Salk. 390; Ld. Raym. 64.

(b) Leigh v. Shepherd, 2 Br. & B. 465; 5 Mo. 297. See also Gilb. Dist. 161.

(c) Pullen v. Palmer, 5 Mod. 72, 150; Carth. 328. Anon. 12 Mod. 96.

(d) Hob. 208.

(e) Leigh v. Shepherd, Robinson v. Hofman, 4 Bing. 562; 1 M. & P. 474.

(f) Distresses, 38; 2 Leon. 7; Roll. Abr. 668.

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How far the
goods of the
tenant of the
land are liable.

be lying down and rising up on the premises for a night and a day without pursuit made by the owner of them.

It must be understood here that the cattle escaped into the land through defect of fences, for if they be there damage feasant they may be distrained at once. (a)

The goods of the tenant of the land cannot be taken on a distress for a rent granted subsequently to the creation of the tenancy, but they are liable for one granted previously. (b) And, therefore, where lands subject to a rent are leased, and the lessor covenants to keep the lessee harmless, though the latter ought not voluntarily to pay the rent, yet if he be compelled by distress, the covenant will be broken. (c) Where there is an existing charge on the premises, and the lessee pays the rent to prevent a distress which is threatened, he may set it off in discharge of his own rent, though his lessor had not created the charge. (d)

But though the tenant's property may not be distrained for the arrears of a subsequent rent, the grantor's may if it be found upon the land. (e)

No distress
where the land
charged comes
to the crown.

Where lands subject to a rent come into the possession of the crown, no distress can be made thereon, because of the prerogative, though the rent is demandable. But if the lands be granted out again, the property of the grantee thereof would be liable to the distress for all the arrears. (f)

It has also been determined that the goods of a copyholder cannot be taken in distress for a prescriptive rent charged on the manor if they have not been accustomed to be distrained, because the copyholder is in by prescription as well as the owner of the rent, and therefore it cannot be shown that the charge was before the copyholder's estate began. (g)

How far property
distrained for a
rent can be sold.

Anciently, when goods were taken on a distress they remained as a pledge to compel the party distrained upon to

(a) Vin. Abr. Distress, I. 42.

(b) Roll's Abr. 669; Com. Dig. Distress, B. 2. *Reynald v. Cokeley*, Roll Abr. 672.

(c) *Hannam v. Redman*, 3 Salk. 109.

(d) *Taylor v. Zamira*, 6 Taunt. 524; 2 Marsh. 220.

(e) *Brownl.* 32.

(f) 1 Leon. 191; Sav. 125.

(g) *Cannon v. Turner*, Roll's Ab. 669.

pay the rent. But the statute 2 W. & M. c. 5, allowed them, when taken for arrears of rent reserved and due upon a demise, lease or contract, to be sold. The 4 Geo. II. c. 28, s. 5, gives the grantee of a rent seck the same remedy by distress as lessors have for rent reserved, which was the power of sale allowed by the statute of W. & M. But this statute does not mention rent charges. And the 11 Geo. II. c. 19, s. 8, whereby landlords were authorized to distrain and dispose of corn, grain or other produce growing upon the land, did not extend beyond the case of landlord and tenant. It has been doubted how far the grant of a rent charge alone would confer a power to sell the goods distrained, and, hence, in modern deeds there is usually inserted a covenant that the grantee shall have the like powers of sale that the lessor has for his rent reserved. That covenant is not quite adequate in all cases, as appears from a case^(a) lately decided on a writ of error in the Exchequer Chamber. There power was given to detain, manage, sell, and dispose of the distress in the same manner in all respects as distresses for rents reserved on leases for years, it was held that this power was to be construed strictly, and was satisfied by giving it the force of the powers granted under the statute of W. & M. without extending it to the new power first granted by the 11 Geo. II. Hence the grantee was not justified in distraining and selling growing crops.

Suppose property be taken on a distress for a rent, can the grantee of a previous rent make any claim thereon? The author has not found any authority on the point, but it seems that if there be no term created, there is nothing in law to give priority to either grant, in reference to the distress. The goods when seized are in the custody of the law, and cannot be intermeddled with. Without a power of sale they would only be in the possession of the grantee as a pledge until the arrears be paid, and it seems that the case would resemble any other instance where property is pledged to

Right of a
grantee of a pre-
vious rent over
goods distrained

(a) *Miller v. Green*, 8 Bing. 92; 2 Cr. & J. 142.

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secure any particular debt, it is not affected by the circumstance of the pawner owing prior debts. If more than enough be taken, the second party who distrains would be entitled thereto, but it is difficult to see how he can enforce his right.

Where a term has been created to secure the first grant, the entry of the second grantee would be wrongful; but upon this the reader is referred to page 229.

Grantee may
distrain for
previous arrears
after he has
been satisfied
for later pay-
ments.

This point also deserves to be noticed, that the grantee may distrain for rent due at one day, though he has already distrained for that due at a subsequent period. The contrary was urged on the authority of the old law regarding an acquittance, considered above in page 311; but the Court drew this distinction, that the acquittance was a voluntary act, but the avowry not so. (a) However, this does not seem very satisfactory, for if the avowry be compulsory, yet the act of distraining itself is not. The decision, however, stands upon rational grounds, the tenant has not discharged what is demanded on the distress, and therefore ought to continue liable.

And agreeable with this decision is *Fountain v. Gualles*, (b) where it was held that the distress taken for one year did not prevent the grantee from bringing an action of covenant for the arrears of a previous year.

Power of dis-
tress ceases with
the rent.

Subject to the exceptions above detailed, where the rent determines by the act of God, in all other cases the power of distress ceases with the continuance of the rent, and the grantee loses this remedy for whatever arrears may then be due; so that not only the rent, but also the penalty attached thereto cannot be distrained for. (c)

Remedies by
action or suit at
law.

Thus, then, the entry on the lands charged, and taking of the rents and profits; the retainer of the value of the annuity; and the distress on the land, are the remedies which the party may exercise himself: yet these remedies may not always be open, or it may not be advisable to adopt

(a) *Palmer v. Stanage*, 1 Lev. 43; 1 Sid. 44; 1 Keb. 95. 113.

(b) *Comb.* 59.

(c) *Tutter v. Fryer*, *Winch*, 7.

them, it will then be necessary to resort to a court of law, and the remedies attainable through such intervention may now be discussed.

In the first instance, where an annuity has been granted by the King, which can hardly take place in modern times, except under peculiar forms, as against the King himself, there is indeed no express remedy. If the annuity be not paid, the King cannot be sued, for he is amenable to no tribunal: yet the law, assuming that the King does not wilfully refuse to do right, gives the party entitled a species of remedy by what is termed a petition of right, or a *monstrans de droit*, the latter being more strictly used where the party has a patent of his right, the former being of general application in any case where the subject has suffered a wrong for which he claims redress against the crown. In these proceedings the subject only points out to the King, or rather to the King's courts, the right which he claims, or the wrong he has suffered, and the presumption of the law is, that when the King is satisfied of the truth thereof he will grant redress.

Besides these remedies where the application is to the King, there was a mode of applying by petition to the Court of Exchequer, in its capacity of administrator of the King's revenue. Here the grantee exhibited the patent of his grant, prayed that it might be enrolled, and that the Court should issue a writ to the treasurer and chamberlains to execute the judgment which the court should pronounce. Two instances of this have been preserved in Plowden's *Commentaries*, one, Sir H. Nevil's Case and the other Sir Thomas Wroth's; but in the celebrated banker's case, (a) in the reign of William the Third, the same redress was sought, and the legality of this method was canvassed at great length, and with great difference of opinion. The ultimate decision of the House of Lords was for the legality, but it does not appear that the course has been since pursued. At present, either the lords of the treasury are

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Against the
crown by peti-
tion of right or
*monstrans de
droit*.

(a) *Rex v. Hornaby*, 5 Mod. 29.

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Against the officers of the crown.

memorialized, or an application is made to parliament in respect to what may be considered public grants.

Where, indeed, the King is not in default, but the money due has been paid over to the officer, who is appointed to distribute it to the proper claimant, a remedy has been in some cases (a) allowed against that officer, at the suit of the party entitled. But if there arise any dispute between the crown and the grantee, even after the arrears have been deposited with the officer, the latter cannot be responsible personally if he has been directed by the crown not to pay them over.

Where they are not liable.

Where the officer is to exercise any judgment or control over the funds entrusted to him, or any trust is reposed in him in regard to their management, he is not personally liable to an action at the suit of the grantee for any arrears, because public policy will not allow public servants to be personally responsible for public liabilities and engagements. Therefore it was decided that a retired clerk of the War Office could not maintain an action of assumpsit against the secretary at war for his retired allowance, although the latter had received the money applicable to such allowance. (b)

Proceedings in ecclesiastical courts for the recovery of church pensions.

Against all other persons, corporate or individual, the grantee may proceed for the arrears of an annuity as for any other debt; but a pension or annuity issuing out of any ecclesiastical property, or claimed by a spiritual person in right of his benefice, may be sued for either in the courts of common law, or in the ecclesiastical courts, at the election of the party entitled. (c) And it is said by Lord Helt, that if a pension come by prescription out of a rectory inappropriate, though the rectory come into lay hands, yet it may be sued for in the spiritual court, because it might have

(a) *Lidderdale v. Duke of Montrose*, 4 T. R. 248; *Friddy v. Rose*, 3 Mer. 93.

(b) *Gidley v. Lord Palmerston*, 3 Br. & B. 275; 7 Mo. 91.

(c) *F. N. B.* 51; *Collier's C. Cro. E.* 675; *Dean of Norwich v. Dr. Collins*, Hard. 230; *Anon.* 1 Keb. 523; *Smith v. Bishop of Lincoln*, 2 Keb. 439; 34 and 35 Hen. VIII. c. 19.

commenced by a spiritual act, and otherwise all lay impropiators would be free. (a)

In the 2nd Inst. 491, Lord Coke draws this distinction, if the pension have been assigned for commutation of tithe, it is suable in the ecclesiastical courts; but if it be claimed by prescription, or be granted by deed, it is only tryable in the common law courts. But this distinction does not seem to have been generally acted upon; (b) at least, if the prescription be admitted, the spiritual courts have consueance, if not, it seems indeed that they cannot try the suit, because the prescription is a fact to be tried, and can only be tried by the common law process as a *modus*. (c)

If the party once bring his action in the common law courts, he cannot afterwards sue in the spiritual, because his election is determined, and having once stated it to be an annuity, he cannot afterwards treat it as a pension. (d)

In regard to the amount of redress, it has been holden that where an incumbent is sued for the arrears of a pension issuing out of his church, he is answerable for the arrears accrued in the time of his predecessor as well as his own. (e)

A bishop may sue for a pension before his own chancellor. (f)

Where an annuity is bequeathed by will, payment may also be enforced in the ecclesiastical courts, as of any other legacy; if it be charged on personalty, as on a term for years or for life, but not if it be charged on land itself. (g)

Between party and party redress is afforded to the grantee at law in the real action of the assize, the mixed action of re-

Actions between parties.

(a) Anon. 12 Mod. 397; *Smyth v. Bishop of Lincoln*, 2 Keb. 439. *Philips v. Hinkson*, 1 Keb. 41.

(b) F. N. B. 51, B. 52, L.; *Smith v. Wallis*, Salk. 58; *Smith v. Bishop of Lincoln*, 1 Vent. 3.

(c) Anon. 1 Vent. 265.

(d) *Barry v. Treveswick*, 1 Mod. 218; F. N. B. 51 B.

(e) *Trinity Coll. v. Tunstal*, Cro. El. 810.

(f) *Smyth v. Bishop of Lincoln*, 2 Keb. 439.

(g) *Tooker v. Tooker*, ib. 95.

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The real action
of the assize.

plevin; and the three personal actions of annuity, debt, and covenant. Although the first has become almost obsolete, so that little information can be found relative thereto in modern times, and thus a fair inference is raised that information is not required upon the subject, and although this, with all other real actions, has been judiciously proscribed by the Real Property Commissioners, (a) yet it would not be right altogether to omit it in a treatise like the present.

Where a rent is granted to one for an estate not less than freehold, and he has been ever seised of the same, he is entitled, on being disseised thereof, to bring an assize of novel disseisin against the disseisor as in the ordinary case of land; (b) and if his ancestor have been seised and he have been disseised by abatement, intrusion, or otherwise, he may have an action of mort d'ancestor, or a writ of ayel or cosinage, or indeed any of the forms of real actions. (c) It is absolutely necessary that the party suing out this writ, or some one through whom he claims, should have had seisin of the rent. The seisin must be actual, and not merely a legal construction; and it seems that payment of a portion of the rent by the tenant voluntarily, or after distress, is the proper act of seisin. (d)

The seisin must be given by a tenant of the freehold at least, for it was expressly decided in *Breddiman's C.* (e) that seisin cannot be granted by a mere tenant for term of years. At the common law it was sufficient if the claimant proved a seisin of the rent by payment or distress at any time within memory; but it is enacted by the 32 Hen. VIII. c. 2., that no writ of right shall be maintained for a rent, annuity, or pension, where there has been no seisin within sixty years, nor a possessory action on the seisin of an ancestor above fifty years since, or on the demandant's own seisin after thirty years.

Against whom
it was brought.

The assize may be brought against the disseisor himself

(a) 1st Rep. prop. 1.

(b) Litt. s. 233; Lilly's Treatise of Assize of Novel Disseisin.

(c) Litt. s. 235. 236.

(d) Ib. & Co. Com.

(e) 6 Co. 56 b.; Cro. J. 142.

or against the tenant of the land. If, however, the writ be sued against the tenants, since the grant of a rent charge is against common right, it is holden necessary for the demandant to name all the tenants of the land charged in his writ, and if he omit any his writ fails. (a) So it was held, that where the rent issued out of two acres, and the tenant pleaded joint-tenancy with a stranger in one, the whole writ abated. (b)

This action would not lie for rent out of demesne lands. (c)

The demandant must prove the disseisin of himself or his ancestor, according as he alleges it in his writ. Some instances of disseisin are mentioned by Littleton in s. 233. As if the grantee go upon the land and demand the arrears, and the tenant refuse to pay them, or be not ready, or be not there to pay the rent, the former is held to be disseised. So payment to a stranger would be a disseisin. (d) But the demand, however, should be made at the precise day of payment, because although there would be a disseisin, if the grantee come after that day, and it be not paid, yet if the tenant had been on the land at the appointed time ready to pay, and no demand were made upon him then, he cannot be treated as a disseisor, unless a personal demand be afterwards made upon him. (e) And so also the demand ought to be on the land, otherwise the refusal is not a disseisin. (f)

Disseisin to be proved, in instances of disseisin.

The demandant recovers the seisin of his rent, and his arrears and damages, and the costs of his writ and of his plea, &c., and if after such recovery and execution had, the rent be again denied unto him, then he shall have a redisseisin, and shall recover double damages. (g)

What recovered in the assize.

The next action in which the grantee may make his claim to the rent is the mixed action of replevin; in which, indeed, he acts the part of defendant, after having al-

Replevin on grantee's distress.

(a) Breddiman's Cases, 6 Co. 58. b.

(b) Anon. Dyer, 31. b.

(c) Fitzb. Ancient Demesne, 41; Dyer, 8. a.

(d) Cutts v. Wills; Dyer, 141.

(e) Maund's C. 7 Co. 29.

(f) Morrice v. Prince, Cro. C. 521.

(g) Litt. s. 233.

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Which he de-
fends in the
avowry.
Pleading there-
in.

ready resorted to the summary redress of distraining; yet, as is well known, his right is often debated and determined in this form of action. Upon the proceedings in the avowries for rents the following points in pleading may be noticed.

In the avowry or cognizance, where the defendant defends the distress under a rent charge, he must set out the grant of that rent, and deduce the title to himself, or the person for whom he has distrained. This was originally always required, but the statute 11 Geo. II. c. 19. s. 22, had allowed landlords to adopt a more concise and general mode of pleading, and it was conceived that the grantee of a rent charge was also privileged by this act. But the Court of Common Pleas have decided that he is not within it, for, from its language, it could only apply to rents issuing out of land as a service, which a rent charge is not, and though it was urged that land might be conveyed in fee, and a rent be reserved, yet it was answered that the land could not in such case be said to be enjoyed at that rent as the statute required. (a) This decision has since been supported by the House of Lords, in a case of *Pluck v. Digges*. (b)

It had been holden to be not sufficiently precise to plead in an avowry, that the rent is granted out of the place in question, among others, without describing all the particular lands charged; because it was urged the tenant may reply that the grantee has purchased a part, and thereby extinguished the rent. (c) But in a subsequent case (d) the point was ruled differently, and Lord Holt, though at first inclined against it, decided that the avowry was sufficient. The reporter refers to the precedents of avowries, and points out a distinction where the rent is charged upon a manor or close, or entire thing, and where upon divers things. He also adds, that the plaintiff can pray oyer of the deed, and plead a purchase, if there have been one.

(a) *Bulpit v. Clarke*, 1 New R. 56.

(b) 2 Dow & Cl. P. C. 180.

(c) *Tregany v. Fletcher*, 1 Lord Raym. 154; *Osby v. Pullen*, 12 Mod. 319.

(d) *Horne v. King*, 1 Lord Raym. 644.

Where the avowry states that a certain sum is in arrear, and only claims a part of it, it is held that the avowant must show that the rest has been satisfied or discharged, because the law will not allow distresses to be multiplied for the same sum. (a) And the same rule prevails in debt and annuity, because actions shall not be multiplied for the same demand. (b)

In an avowry by an executor for rent due to his testator, he is not bound to show that the plaintiff was seised of the land when the arrears accrued, or that he claims by, through, or under the tenant at that time. If the plaintiff be not liable it lies upon him to show that in his plea. (c)

A husband may avow alone for a rent devised to his wife, or due in her right. (d)

A rent in fee must not be pleaded as a rent for life. (e)

When a rent was granted on an equality of partition, although it was customary to allege a seisin, yet the allegation was not material nor traversable, since the title and commencement of the rent was by the deed. (f) But when the beginning of the rent was not known, it was necessary to allege a seisin.

When seisin to be alleged.

The 22d section of the statute 11 Geo. II. c. 19, gives to the party avowing for rents, quit rents, reliefs, heriots, and other services, double costs, but it has been held that this part of the clause also does not apply to the grant of a rent charge. (g)

Double costs not allowed to the grantee.

The 23d section of that act requires sheriffs to take bonds for prosecuting the suit with effect in every replevin of a distress for rent; which word *rent* is there used generally,

A replevin bond may be taken on a distress for a rent charge.

(a) Sir John Holt v. Sambach, Cro. C. 103; Johnson v. Baynes, 12 Mod. 89; Comb. 346. See 3 Keb. 201, contra.

(b) Anon. 12 Mod. 72.

(c) Hool v. Bell, Lord Raym. 172.

(d) Osborne v. Wickenden, 1 Mod. 273; 2 Keb. 711; Gravenor v. Woodhouse, 9 Moore, 148.

(e) 1 Ventr. 142.

(f) Fawkenor v. Bellingham, Cro. C. 82; Sir W. Foster's C. 8 Co. 128; Gilb. Distr. 155.

(g) Lindon v. Collins, Willes, 429; Leominster Canal Company v. Norris, 7 T. R. 500; Same v. Cowell, 1 B. & P. 214.

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without any qualification as in the previous section. It was contended, however, that as that section had been holden not to apply to a rent charge, and the whole act clearly referred to cases between landlord and tenant, a replevin bond on a distress for a rent charge was not warranted by the act. The court decided, that though the restricted construction was proper in the former, which was a penal clause, yet that on this, a remedial clause, they were justified in putting a liberal construction. Therefore, the word *rent* not being qualified or restrained by the act, the replevin bond was valid. (a)

Personal remedies.
1st. By an action of annuity.

Nature of that action, and judgment recovered therein.

The grantee has also three personal remedies on the grant, as already observed,—the actions of Annuity, of Debt, and of Covenant. The action of Annuity has been almost entirely disused for a long time, and indeed is one of those whose abolition has been recommended; but with great deference to the learned Commissioners of the common law, if different forms of actions be retained, this action, slightly modified, might be restored to practice with no small advantage. It is an action which enables the grantee to claim his annuity and the arrears that may be due, at the time when the writ is sued out; and if he establish his claim, the court adjudges him to recover his annuity, the arrears due as claimed in his writ, those which accrue before the judgment is signed, together with the damages he may sustain by the non-payment of the annuity, to be assessed in some cases by the court, in others by the jury. (b) This judgment remains as a security for the due payment of the annuity in future, which can never again be called in question by the defendant, or any person claiming by or through him. (c) During the space of a year after the judgment the plaintiff may take out the usual writs of execution. After that time, he or his representatives, personal or corporate, may have a scire facias on the judgment for the amount already adjudged, in the event of its not having

(c) *Short v. Hubbard*, 2 Bing. 349; 9 Mo. 667.

(b) *Dyer*, 377; *Moore*, 88.

(c) *Higgin's C.* 6 Co. 45; *Co. L.* 145. a.

been discharged, (a) and he also for the payments which accrue from time to time after the judgment, but it is the better opinion (b) that the representatives must bring a fresh writ of annuity for the arrears accumulated after the death. To this *scire facias* the defendant may plead payment or any other matter which shall controvert the plaintiff's right to the payments he claims in this writ. And hence Rolle (c) thought that the *scire facias* should be required in all cases, whether a year had elapsed or not, but the old authorities are against him, and the plaintiff has his year without it, except indeed in one instance. If the judgment be recovered against a spiritual person, as a charge on his benefice, who dies within the year, there must be a *scire facias* to revive it against his successor.

On a *scire facias* on a judgment in annuity, the defendant cannot demand oyer of the annuity deed, because he is not bound thereby, but by the judgment. (d)

At the common law, process of outlawry did not belong to this action, but it is given by 28 Hen. VIII. c. 14.

As annuity was a personal action only, (e) it would not lie for a rent which is a portion of the realty, and hence it has been already remarked, that the bringing this action was evidence of an election between a personal and a real charge. (f) If, therefore, it should appear from the grant, as set forth in the writ or declaration, that a rent only has been granted, and not an annuity, the action cannot be supported. But the Courts will not infer this from a mere inaccuracy of expression. (g)

It would not lie
for a rent.

Where the rent is granted in satisfaction of a real right, the grantee cannot elect to treat it as a personal grant, and therefore cannot bring a writ of annuity on the deed which creates it. (h)

(a) Perk. Devise. s. 499; Bro. Ab. Annuities. 17. (b) Dyer. 376. b.

(c) Abr. Annuities.

(d) Bro. Abr. Monstrans de fait.

(e) Morrice's C. 2 Keb. 200; Bodwell v. Bodwell, Cro. C. 171; Sir W. Jo. 214.

(f) Dyer, 221. b. 227.

(g) Bodwell v. Bodwell, Sprint v. Hicks, 2 Buls. 148; Hope v. Colman, 2 Wils. 221; Alfred v. Newel, 3 Keb. 808.

(h) Co. L. 145. a; Roll. Abr. 227.

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The plaintiff could only recover to the extent of the demand in the writ, and, therefore, where he claimed the arrears to Michaelmas, and a quarter was due at the Christmas before the writ was sued out, although he recovered the arrears accruing during the writ, it was held he could not recover the quarter due at Christmas, it being presumed to have been paid. (a) Still, where the judgment was entered for too much, the Court held that the miscasting was only a clerical error which did not defeat the judgment. (b)

The plaintiff may recover the annuity though there be no arrears.

As the principal part of the judgment in this action is the recovery of the annuity, though the defendant should prove that there are no arrears, still the plaintiff would have judgment of his annuity. (c) And, hence, when the annuity is determined, this remedy cannot be adopted. So far is this principle acted upon, that if the annuity cease during the pendency of the action, there is immediately a discontinuance thereof, and the writ is gone. (d)

At the same time, it is held by the Court in Digg's Case, (e) that the action is not maintainable before there have been some arrears; and, therefore, it is said to have been customary to allege arrears although, in truth, there were none.

Debt is maintainable for arrears due at the determination of the annuity.

It must not be supposed that the grantee is deprived of all remedy when the writ of annuity fails him, the nature of his remedy only is changed. The arrears which may then be due form a certain ascertained sum, and the proper remedy by the old law for the recovery of certain and fixed demands, was an action of debt. Debt, therefore, is the proper action for the arrears when the annuity has determined, though an action of covenant may be brought in some cases. (f) It seems to be immaterial whether the annuity have been personal or real; in either case the

(a) *Franks v. Stukeley*, Roll. Abr. Annuities, G. 3; *Clotworthy v. Clotworthy*, Cro. C. 436.

(b) *Trewinnard v. Skewys*, Dyer, 56, b.

(c) Roll's Abr. Annuities, G.

(d) *Backhouse and Spencer's Case*, 2 Leon. 51.

(e) *Moore*, 134.

(f) Bro. Ab. Dett. 121, 144; Annuities, 132; Dyer, 21, a.

arrears on its determination are recoverable in debt. Though the rent have been granted originally with a proviso that the grantor's person shall not be charged, yet an action of debt may be maintained against his executor for the arrears due at his death, otherwise he would be without remedy. (a)

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But while the annuity or rent is in continuance an action of debt is not maintainable, (b) because a writ of annuity is the proper remedy for the former, and the judgment must be for damages which are uncertain, and because in the case of a rent it is a real right which cannot be claimed in a personal action, but is the proper subject for an assize. Accordingly, it was decided in Lillingston's Case, (c) that debt was not maintainable for the arrears of a rent by the creditor under an extent on a statute acknowledged by the grantee, who had released the rent to the tenant of the land, because, as the release did not operate against the creditor, the rent continued as far as he was concerned.

But not while
the annuity con-
tinues.

C. B. Gilbert, in his treatise on Debt, (d) confines this restriction to life annuities, for he says, that on an annuity for years the grantee may have an annuity for the whole, or debt for each separate payment, as he may upon the grant of a rent charge for years, because, being in the form of a chattel, it gives the grantee the double remedy.

That is if it be
not for years
certain.

But when a rent has been granted for a term of years, as an assize will not lie where there is not an estate of freehold at least, it has been a question how far the grantee can maintain debt for the arrears during the continuance of the term. In Tanfield's Case, (e) it was agreed by all the judges, that the action was not maintainable, but afterwards, in Brown v. Pendlebury, (f) where it was objected that a writ of annuity was the proper remedy, the Court held that

Whether debt is
maintainable for
rent granted for
years certain.

(a) Newdigate v. Gapell, Dyer, 327. See also 6 Co. 41.

(b) Com. D. Dett. (A. 7); Gilb. Debt. I. c. 2.

(c) 7 Co. 38.

(d) Book I. c. 3; and the distinction is admitted in Webb v. Jiggs, 4 M. & S. 114.

(e) Cro. E. 3.

(f) Cro. E. 268.

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debt did lie, it being a grant for years, for it was in the nature of a special contract. Again, the doubt was expressed in *Brendloss v. Philipps*.^(a) where Yelverton, J., held that the action could be supported, but Fenner, J., doubted, and no judgment was given. In *Lucas v. Fulwood*,^(b) Williams, J., says expressly, that debt will not lie for an annuity for years while the term continues. And a similar opinion was stated by Lord Holt in *Davis v. Speed*.^(c) See also *Tyndale v. Harrington*,^(d) where the same objection was taken in arrest of judgment, but was not decided. Yet, in a case of *Pilton v. Darby*,^(e) it was determined, on the authority of *Browne v. Pendlebury*, that the grantee might avail himself of this action. It is seen above that C. B. Gilbert thought this action maintainable, and indeed made no doubt of it.

Cases where
debt is maintain-
able though the
annuity con-
tinues.

But there are some cases where the annuity continues, and yet an action of debt is maintainable for the arrears; as where the annuity is one of inheritance, on descent or devise the heir or devisee cannot claim the arrears; and the executor has no title to the annuity; the latter, therefore, can maintain debt for the arrears due at the decease of the testator.^(f) Thus, also, in the instance stated in *Roll's Abr. Dett. I.* cited from 19 Hen. VI. 42. Where grantee in fee of an annuity grants it over for a term of years, after the term expires the lessee shall have debt for any arrears then due, because he has no other remedy. But in these cases it is apparent that the portion of the annuity carved out, either for the term of life in the former, or of years in the latter, has determined before the action of debt is brought, although the remainder of the annuity may be continuing.

Again: if an annuity be payable to a parson or prebendary, who resigns or dies, leaving arrears, he in the former instance, or his executor in the latter, may have debt for

(a) Cro. E. 895.

(b) 1 Buls. 151.

(c) 5 Mod. 144.

(d) Style 162.

(e) Comb. 57.

(f) Bro. Ab. Annuities, 46.

such arrears, as it is evident the annuity has ceased in regard to him personally. (a)

The grantee may have an action of debt for collateral liabilities, as for a penalty, though the annuity be still continuing. (b)

Although at the common law the executor or administrator of the grantee was entitled to bring an action of debt for the arrears due at the death of the grantee, he could not if the annuitant were alive, because the rent was continuing. The statute 32 Hen. VIII. c. 37, the provisions of which were fully stated above, in p. 369 *et seq.*, extends the remedy by debt to this case, and reiterates the common law right to the action in the other. The reader is referred to the interpretation given to that statute already discussed, but the following points apply more particularly to this action:—

The statute gives the action of debt against the tenant that ought to have paid the rent so being behind in the lifetime of the testator, or against the executors and administrators of the said tenant. Upon this it was contended in Bingham and Parkhurst's Case, (c) that the remedy is not given against a tenant not in possession, and, therefore, that if the tenant grant a lease for years, the lessee may be liable for arrears accruing during the term, but the lessor is not. This was denied, and the point was not decided.

On the other hand, where an executor brought an action of debt on this statute against the occupier of the land, it was objected that it would not lie except against the tenant. According to the report judgment was stayed; and Rolle doubted of the case, but inclined against the plaintiff. (d)

The action should be brought against *all* the persons of the profits, but if it be against one alone, he can only take advantage of the objection by a plea in abatement. (e)

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Provisions of
32 Hen. VIII.
c. 37, regarding
actions by ex-
ecutors and ad-
ministrators.

(a) Ognell's Case, 4 Co. 49.

(b) Dyer, 23, Marg.

(c) Litt. R. 93.

(d) Dunsh v. Smith, Al. 62; Style, 139, 146.

(e) Duppa v. Mayow, 1 Saund. 281.

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And where a husband is seised of land in right of his wife, which is charged with a rent charge, the action for the rent arrear should be brought against him alone, by reason of his taking the profits. (a)

This action is local, and must be brought in the county where the lands lie, because, when the contract is determined, the charge is only by reason of the pendency of the profits. (b)

It is immaterial how the annuity is created, debt will not lie.

The law being established, that debt would not lie for the annuity or rent for life or in fee while it has continuance, a distinction has lately been urged between rents or annuities created by a common law conveyance and those which take effect from the statute of wills. In the latter case it was said that the real remedy of the assize was not open to the grantee, and therefore he would be without remedy if he could not maintain this action. But the Court of King's Bench decided that there was no ground for this distinction, for that the party would have a remedy by assize to recover his annuity, and *Brediman's Case*, 6 Co. 56, b., was cited where an assize was brought for an annuity devised by will. Again: the statute 8 Ann. c. 14, was referred to, as having given the remedy in this case, which statute enacts, in section 4. that persons having rent in arrear upon a lease or demise for life or lives may have an action of debt for such arrears. But the Court held that this only applied to the case of rent due from a tenant holding by lease or demise under the landlord, which was not that case, there being no such privity between the devisee of the land and the devisee of the annuity charged thereupon, as between a lessor and his lessee. (c) This case was supported subsequently by the Court of Common Pleas in *Kelly v. Clubbe*, (d) where, however, the plaintiff avoided stating that the grantor had an estate of freehold in the lands, but alleged that the defendant, who was also

(a) *Billingsworth v. Spearman*, 11 Mod. 169.

(b) *Pine v. Countess of Leicester*, Hob. 37; *Harris v. Harris*, 3 Keb. 503; *Morris v. Kiffin*, ib. 439, 534.

(c) *Webb v. Jiggs*, 4 M. & S. 113. (d) 3 Br. & B. 130; 6 Mo. 335.

the grantor, had received the rents and profits of the premises to the plaintiff's use. The Court, however, held the case not distinguishable from *Webb v. Jiggs* in principle, that it must be taken the grantor had a fee in the premises when nothing appeared to the contrary, and that the circumstance of the grantee's taking a freehold was of itself sufficient to bar the action.

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The result of the above cases gives these principles:—That an action of debt cannot be maintained by the grantee of a freehold rent, however his title may have accrued, while the rent is in continuance. But after it has determined he may have this action for any arrears then due; and whether it be determined or not, his executor or administrator may maintain it for any arrears due at his demise. If the rent be for term of years only, the better opinion appears to be, that debt is maintainable by the grantee for the payments that fall due before the term has expired.

Result of the
above authorities.

There is a case (a) which came lately before the Court of King's Bench, where an action of debt was brought on a bond to pay an annuity to one for life. It was brought against the devisee of the obligor's land, under the statute against fraudulent devises, 3 & 4 Will. III. c. 14, and the Court held him not liable, because his estate in the land had ceased; but the objection that such an action was not maintainable for a continuing annuity was not urged.

The point decided there was, that as the bond was for payment of the annuity, and there was no penalty, the devisee was only liable to pay the annuity while his estate in the land continued. If it had been secured by a penalty, and that had been forfeited, either before the devisor's death or during the continuance of the devisee's interest, the latter might have been liable for the whole amount of the penalty, provided the value of his interest in the land was equivalent.

At present, when an annuity is frequently granted by a bond in a penalty conditioned for the due payment of the

Debt on bond
securing the
annuity.

(a) *Morant v. Gough*, 7 B. & C. 206; 1 M. & R. 41.

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Such bonds are
within 8 & 9
Will. III. c. 11.

annuity, the bond becomes forfeited on the breach of that condition by default of payment, and the obligee may sue in debt for the penalty. Where an action is brought on such a bond, the plaintiff must assign breaches, under the statute 8 & 9 Will. III. c. 11, as was holden in *Collins v. Collins*. (a) And on judgment for the plaintiff on demurrer, or on default or confession, there must be a suggestion of breaches on the roll. In these cases the judgment by the provision of that statute remains as a security for the annuity as far as the penalty of the bond, and farther breaches which may occur, after the satisfaction of those for which the action is first brought, may be recovered thereon, though a *scire facias* must be sued out, calling upon the defendant to show cause why he should not satisfy these last accrued arrears. So that the proceedings appear very similar to those in the writ of annuity.

After the judgment of the Court in *Collins v. Collins*, two cases occurred in the Court of Common Pleas, where a sort of equitable discretion was exercised, and this statute was not called in aid. In one, *Howell v. Hanforth*, (b) where judgment was entered up on a warrant of attorney given to confess judgment on an annuity bond, and execution was sued out for the several breaches from time to time, without any *scire facias*, the Court directed the judgment to stand as a security for the annuity, and execution to be taken out from time to time, as might be necessary, on application to the Court. And in a subsequent case of a judgment on an annuity bond, the judgment was ordered to stand as a security, with a like liberty to issue execution for the arrears. (c)

Hence it was thought that this statute did not apply to annuity bonds, but after it had been held in *Roles v. Rosewell*, (d) that that statute was compulsory on the plaintiff, it was determined by the Court of King's Bench that the judgment in *Collins v. Collins* was correct, and that on such bonds, after judgment for the plaintiff on demurrer, he

(a) 2 Burr. 820.

(b) 2 W. Bl. 843.

(c) *Ogilvy v. Foley*, 2 W. Bl. 1111.

(d) 5 T. R. 538.

must suggest breaches on the roll and proceed according to the directions of the act; (a) which decision has been recognized in subsequent cases, and the practice has been conformable with it. (b)

This provision of the statute, which requires either an assignment or a suggestion of breaches, has created some difficulty, more especially in cases referring to annuities. It is fully considered in the learned notes to the last edition of Saunders' Reports, and the following is extracted as the rule from vol. ii. p. 187 b, note (c):—

“Some confusion seems to have arisen in the course of these cases from a want of due attention to the difference between an assignment of breaches under the statute, and a suggestion of them. The result of the whole seems to be this: the plaintiff may if he pleases state the condition of the bond in his declaration, and assign several breaches under the statute; whereas at common law he could only assign one. Or the plaintiff may declare on the bond generally; in which case, if the defendant suffer judgment by confession or *nil dicit*, or the plaintiff have judgment on a demurrer, either to his declaration or to any plea thereto, the plaintiff enters a suggestion in the mode detailed in the note to *Gainsforth v. Griffith*, *ante*; (c) if the defendant plead any plea on which the plaintiff might at common law have taken an issue in his replication, without assigning a breach of the condition of the bond, the plaintiff may still take such issue, and may enter a distinct and separate suggestion of breaches under the statute; but he cannot incorporate such issue and such suggestion in one and the same replication. If the defendant plead any plea which made it necessary at common law for the plaintiff to assign a breach in his replication, as for instance general performance, the plaintiff must still assign the breach in his replication, with this difference, that now he may assign several breaches under the statute, whereas at common law he

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Rules as to the
pleadings in the
assignment or
suggestion of
breaches.

(a) *Walcot v. Goulding*, 8 T. R. 126.

(b) *Willoughby v. Swinton*, 6 East, 553; *Murray v. Earl of Stair*, 2 B. & C. 90.

“(c) 1 Saund. 68.”

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could only assign one. If only one breach be assigned in a replication, it is not necessary to state it in terms to be according to the form of the statute, *Tombs v. Painter*; (a) but it should seem if more than one breach be assigned it must be so stated."

A set-off may be pleaded in an action on such bond.

There seems to be no difference between debt on an annuity, or on any other bond, as to the defendant's pleas.

It was doubted whether a set-off could be pleaded to such a bond, and it was argued at length in the above cited case of *Collins v. Collins*, (b) but the Court decided, after deliberation, that such a plea was available in this action.

In this action it is stated by Mr. Archbold, (c) that the defendant may obtain a stay of proceedings on payment of the arrears and costs, and giving the plaintiff judgment in the action as a security for the future payments.

Covenant on the annuity deed.

The third action which the grantee may adopt is covenant, which has, indeed, taken the place of the old action of annuity, though it does not possess the same advantages. In covenant, the grantee declares upon his deed and shows how the grantor has broken his covenant, and recovers damages to the value of the breaches he proves: that is, he recovers all the arrears which may be due at the time when the action is commenced, but no more. The judgment does not remain as a security for the annuity in future, but a fresh action must be commenced on each subsequent default. Here there is a disadvantage in comparison with the action of annuity. Still, however, the determination of the annuity pending the suit would not affect this action as it does that.

As to the parties to this action.

Although the rules which govern this action in general are also applicable with reference to this particular contract, yet some points have been the subject of investigation with reference to the parties to the action.

Thus, in *Boscawin v. Cook*, (d) A. granted a rent charge to B. for the life of C., habendum to B., his heirs and

(a) 13 East, 1."

(b) 2 Burr. 820.

(c) 2 Pract. 206. See *Moss v. Hardy, Barnes*, 288.

(d) 1 Mod. 223; 3 Mod. 188.

assigns, to the use of C., with a covenant to pay it to the use of C. The rent not being paid to B. to the use of C., it was held that B. might maintain covenant against A., for though the rent charge is executed in C. by the statute of uses, yet the covenant being collateral remained undischarged. And where a rent charge was granted by indenture, which contained a clause empowering the grantee to enter into the lands till satisfied, an action of covenant was brought on the indenture against the grantor's executor, who pleaded an entry upon and possession of the lands. But it was held that the grantee was not deprived of his remedy on the covenant thereby. (a) This is analogous with what has been above mentioned in the case of a distress in page 367.

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A question of importance has arisen on this point, namely, how far the action of covenant will lie for or against an assignee. The rule of law is, that only parties to a contract, or their representatives, can avail themselves of, or be subject to, an action of covenant, unless the covenant relate to real property, and be necessarily connected with the enjoyment of it, in which case, indeed, it is said to run with the land, and whoever is entitled to the ownership, or to the possession thereof, may claim the benefit, or be liable to the obligation of any covenant of such a nature, although not actually a party thereto. The extreme strictness of the common law is modified by the 32 Hen. VIII. c. 34, which gives a remedy on the covenant to or against parties who become grantees of the reversions of estates where the covenants were entered into by or with the grantors thereof.

How far it is
maintainable by
or against
assignees,

This legal principle is applicable to the two cases of an action against the assignee of the land, and by the assignee of the rent. In regard to the first, the doubt was raised by Lord Holt in *Brewster v. Kidgell*. (b) That was an action on the case, in the form of a feigned issue, to determine whether a certain rent charge was pay-

(a) *Fountain v. Guavers*, 2 Show. 333 ; Skinn. 146.

(b) *Ld. Raym.* 317 ; *Salk.* 198.

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able with or without a deduction of the land tax. The liability of the defendant to pay the rent was not otherwise disputed, but Lord Holt took an objection not noticed by the counsel, nor by the other judges, that the terretenant was not liable to an action on the covenant to pay the rent charge. For he said, "If the ténant in fee grants a rent charge out of lands, and covenants to pay it without deduction for himself and his heirs, you may maintain covenant against the grantor and his heirs, but not against the assignee, for it is a mere personal covenant, and cannot run with the land." Lord Raymond, in his report, adds, "But the other three judges seemed to be in a surprize, and not, in truth, to comprehend this objection, and therefore they persisted in their former opinion, talking of agreements, intent of the party, binding of the land, and I know not what." Salkeld also, after stating this opinion of Lord Holt, observes, "N. B. That was his own opinion only, the other three held that the covenant charged the land." Although in this particular case the objection may have been ill-timed and improper, yet the opinion, so far as it extends to the non-liability of the assignee, seems perfectly tenable. The suing in covenant is clearly an election on the part of the grantee or his assignee to take the grant as a personal annuity, and to release the land, and thereby the occupier or owner thereof. If he wish to hold the land liable, his remedy, as already shown, is by distress or entry on the land, or by an assize or an action of debt against the pignor of the profits on the statute 32 Hen. VIII. c. 37.

By the assignee
 of the rent.

But on the second point an expression is reported to have been used by Lord Holt, which is perhaps not warranted by legal principles. According to the report of the above case in 12 Mod. 170, he observed, "I make no doubt but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted." In Lord Raymond's report, indeed, he does not say that the assignee may have this remedy, but indefinitely, "you may maintain covenant against the grantor and his heirs, but not against the assignee of the

land." Whatever may have been Lord Holt's meaning, the subject has been lately examined in a case (a) before the Court of King's Bench, and it was determined that the assignee of a rent cannot maintain covenant against the original grantor. There one J. B. being seised in fee conveyed to the defendant and T. J., their heirs and assigns, to the use that J. B., his heirs and assigns, might have and take to his use a rent certain, to be issuing out of the premises, and subject to the said rent, to the use of defendant, his heirs and assigns; and defendant covenanted with J. B., his heirs and assigns, to pay to him, his heirs, and assigns, the said rent, and to build within one year one or more messuages on the premises, for better securing the said rent: and J. B. demised the said rent to the plaintiffs for 1000 years. The plaintiffs brought an action of covenant on the indenture for non-payment of the rent, and for not building the premises. The defendant demurred, and contended that the action was not maintainable by the assignee, for that the covenant was merely personal to B., who alone should have covenant; and as to the statute 32 Hen. VIII. c. 34, that gives to grantees of reversions the same advantages against lessees as the lessors and grantors had. But the defendant here was not a lessee, nor were the plaintiffs grantees of the reversion. Littledale, for the plaintiffs, relied on these observations of Lord Holt. But Lord Ellenborough treated them as extra-judicial, and said, "putting aside that dictum, I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shown that this is land; it might as well be applied to any covenant respecting a matter merely personal. The statute of Hen. VIII. recites, that at common law such only as are parties or privies to any covenant can take advantage of it; here is neither privity of contract, nor privity of estate, the rent is reserved out of the original estate." Bayley, J. "The argument for the plaintiffs loses sight of the conveyance by which this rent is created. It is incorrect to state

(a) *Milnes v. Branch*, 5 M. & S. 411.

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it as a rent charge granted by the owner of the fee; it being a conveyance in fee by B. and R. to the defendant to certain uses, one of which is that they shall receive the rent, so that the rent arises out of the estate of the feoffors. It is, therefore, not a grant by the owner of the fee, and the covenant is a covenant in gross." Abbot, J., concurred, and judgment was given for the defendant.

Covenant on severance of land to guarantee against a rent charged on the whole seems to be personal only.

It may not be inappropriate to mention here, that it has been decided that where a man possessed of lands subject to a rent parts with a portion, and covenants to keep it free from the payment thereof, the covenant is personal, and does not run with the other land charged, so as to make that liable for the whole, but binds the heirs if they have assets. This was held in the Exchequer, (a) though there was a decree in a subsequent case in equity, (b) where this rule was not adhered to; and see also *Allen v. Givers, Moor*, 185.

As to the parties who must join in the action.

Another question in this action of covenant on annuity deeds has been one of construction in the application of the rule of law which divides covenants into joint and several, and requires that in the former all the covenantees, or in the event of death the survivors, should sue jointly, but in the latter the several covenantees or their representatives should sue separately. The distinction depends entirely upon the nature of the interest in the subject of the covenant which the parties possess; where that is joint the covenant is also joint; where several, it is several. Two cases have occurred relative to annuities which illustrate this rule. The first is *Anderson v. Martindale*. (c) There one covenanted jointly and severally with A., his executors, administrators, and assigns, and also to and with B. and her assigns, to pay an annuity to A., his executors, administrators or assigns, during B.'s life. A. having died, his administrator brought an action of covenant for the non-payment of the annuity against the grantor. It was objected that the covenant was joint, and survived to B., who ought to have sued. It was answered, that the whole benefit and interest

(a) *Cook v. Earl of Arundel*, Hard. 87.

(b) *Lord Cornbury v. Middleton*, 1 Ch. C. 212.

(c) 1 East, 495.

passed to the intestate alone, for the annuity was payable to him exclusively, and also that the covenant was several in its terms. But the Court of King's Bench held that the covenant was joint, and therefore the defendant had judgment. Lord Kenyon said "The covenant to both was for the same thing, and though the benefit were only to one, yet both had a legal interest in the performance of it." The other case was *Withers v. Bircham*.^(a) There, by a deed reciting the grant of two annuities, one to A., and another to B., it was witnessed that C. covenanted with A. and B. and their executors, to pay the annuities, or either of them, when the grantors made default. And it was held that the interest here was several, for each of the covenantees had a distinct interest in the annuity payable to him, and therefore the covenant was several, and an action brought by the executor of A. alone was maintainable.

Where there are several joint covenantees, all who *may* sue *must* join in the action, and therefore where a man on his marriage covenanted with three persons that his executors should pay an annuity to them for the use of his wife, it was held that one alone could not sue the executors, though he averred in the declaration that the others did not seal the deed. Because though they did not seal, still they might have sued, and it did not appear that they did not assent to it.^(b) In a very late case,^(c) D. E. and C. had covenanted with A. B. and his wife, and the same C. jointly and severally, that an annuity should be paid to B.'s wife. It was held that after C.'s death, A. and B. might sue in covenant D.'s executors, D. and E. being also dead.

When the defendant suffers judgment by default in this action on an annuity deed, the court will refer it to the Master to compute the arrears.^(d) The defendant will also be allowed to pay the arrears into court with the costs, but where several actions had been brought for previous arrears, the costs of which had not been paid, the action was only

(a) 3 B. & C. 254; 5 D. & R. 106.

(b) *Petrie v. Bury*, 3 B. & C. 353; 5 D. & R. 152.

(c) *Rose v. Poulton*, 2 B. & Ad. 822. (d) *Alloway v. Hill*, 2 Chitty, 32.

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REMEDIES.

Defence in
ejectment or
trespass.

stayed on payment of those costs, in addition to those of the particular action. (a)

The grantee, having entered on the lands charged under the power of entry given in the grant, or having distrained, may have to defend himself either against an action of ejectment or trespass at the suit of the occupier of the lands. It does not appear, however, that there is any peculiarity in the case of a grantee of an annuity over other defendants in those actions, and there is no particular observation to be made upon it. In either action he must defend himself under the grant.

Action of
assumpsit.

The previous remedies proceed upon the assumption of a grant having been made, it will be remembered that where a grant has been agreed upon, but not executed, there is a remedy in a court of law, by an action of assumpsit for the breach of that agreement. This has been considered above, in page 71, and there is nothing to add to what is to be found there.

Proceedings on
a warrant of
attorney.

Lastly, the grantee may proceed upon the warrant of attorney, which now almost always accompanies the grant of life annuities on pecuniary considerations. Upon this instrument the grantee may immediately sign judgment, and, on breach of the condition contained in the defeazance, may issue his execution from time to time, according to the terms contained therein. But as this is a very summary process, the courts hold the parties strict in their execution thereof; so that where a warrant of attorney authorized execution to be issued for the arrears, and the plaintiff took out execution for the whole penalty, the court set aside the whole execution as unauthorized. (b) "If," it is said, (c) "the defendant had been taken in execution for too much arrears, they would have directed the Master to find what was the amount of the arrear, and have detained the defendant for so much." Indeed, as it depends wholly upon the practice of the courts, they have always holden a complete control

(e) *Leehill v. Sir T. Reynolds*, 2 Barnad. 253. 260.

(b) *Tilby v. Best*, 16 East, 163.

(c) *Shaw v. Marquis of Worcester*, 6 Bing. 389.

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over the instrument, and the proceedings of the parties under it, so as to prevent fraud or oppression, quite exclusive of the jurisdiction given by the annuity acts which has been already referred to, and of which occasion will occur to treat more at length in the ensuing chapter.

It was decided in *Austerbury v. Morgan*, (a) that a warrant of attorney is not an instrument within the statute of 8 & 9 Will. III. c. 11, so as to require a suggestion of breaches, to be entered on the judgment roll, where it is given to secure an annuity. But as it was thought that the point had not been sufficiently considered, the same objection has been very recently urged and debated in the Court of Common Pleas, and after deliberation this decision was confirmed. (b) The act does not mention this instrument, neither does it fall within the mischief intended to be prevented thereby, in consequence of the control which the courts already hold over it.

Not within
8 & 9 Will. III.
c. 11.

There seems no reason why a judgment signed on a warrant of attorney should not be subject to the ordinary requisites of other judgments, and therefore be revivable by a *scire facias*. Yet in one case, *Scott v. Whalley*, (c) there is a decision which seems somewhat opposed to this. There judgment had been entered up, and execution had issued for two quarters then due, and a fresh execution was sued out for another quarter, which fell into arrear, without a revival of the judgment by *scire facias*, and the court, on an objection, held that the plaintiff was justified, and that it was not necessary to revive the judgment. It does not appear, however, what length of time had elapsed since the judgment had been signed, and if it were not a year old of course the revival would not have been necessary. Mr. Archbold, in his Practice, says it seems not necessary to sue out the writ of *scire facias*, but he refers in his authorities to the act 8 & 9 Will. III. c. 11, and the *scire facias* of the suggestions on that statute. The question here is on the common law process.

Judgment
signed thereon
seems to be
revivable by a
scire facias.

(a) 3 Taun. 165.
(c) 1 H. Bla. 297.

(b) *Shaw v. Marquis of Worcester*, 6 Bing. 385.

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The necessity of this is avoided by the usual terms of the defeazance.

It has been customary, in order to avoid either of these objections, to insert in the defeazance a release on the part of the grantor of all errors on the record, and also permission to issue execution from time to time without reviving the judgment, or suggesting breaches according to the statute. An objection has been made that this last clause would be inoperative, because the parties are not at liberty to renounce the provisions of an act of parliament, but that objection is now immaterial, since the instrument is not within that act. (a) As to the revival of the judgment, that was holden to be waived by this release and license, although the same objection was raised, that the party could not renounce a common law privilege, to which other persons, as for instance the defendant's assignees in the event of a bankruptcy, would be entitled. (b)

Costs of suggestion of breaches.

Where a scire facias is sued out after a judgment by default, on an annuity bond, the plaintiff is entitled to his costs, under the third section of the 8 & 9 Will. III. c. 11, where he suggests breaches, and recovers damages, though in its language the costs are only given on scire facias after plea or demurrer. (c)

Relief for the grantee in a court of equity.

Such, then, are the remedies which the grantee may adopt in a court of law, the relief attainable by him in a court of equity shall now be considered.

No relief where there is an adequate remedy at law.

In the first place, it must be remarked that there will be no interference of such a court in any case where there is already a clear and precise remedy at law; which principle has been frequently applied to the cases of rents and annuities. Thus if a rent be not paid, as seen above, the grantee or party claiming it might have an assize for it, or might distrain, and therefore this court will not entertain any suit in such cases. So far has this been carried, that where a rent descended upon a party, and was not paid for thirty years, yet the ancestor had had seisin until his death, a bill for a decree of the rent and arrears against the landowner

(a) Tilby v. Best, 16 East, 165.

(b) Howell v. Stratton, 2 Smith, 65; Morris v. Jones, 2 B. & C. 242.

(c) Brooke v. Booth, 11 East, 387.

was rejected, because it was said that the plaintiff might have an assize. (a) It is added, indeed, that if there had not been seisin, all the relief the court would have given would have been to give seisin; which probably means that the court would restrain the party from setting up as a defence in an assize at law the want of seisin. So where there is a power of distress, the court will not interfere, even though it be alleged that there is no stock on the land, but that the land has all been converted into tillage. (b) If there be any fraud on the part of the landowner, that indeed may make a difference, and an issue will be granted to try this at law. The mere untenancy of the land, and the infancy of the landowner, is not a ground for interference; and the court will not in such a case direct that a distress should be set out to answer the arrears, at least in the absence of fraud. (c)

But as is stated by Lord Hardwicke, in *Benson v. Baldwin*, (d) "Where a man is entitled to a rent out of lands, and from length of time the remedy at law is lost or become very difficult, the Court of Chancery has interfered and given relief, upon the foundation only of payment of the rent for a long time, which bills are called bills found upon the *solet*. (e) The court has even gone so far as to give relief where the nature of the rent (as there are many kinds at law) has not been known, so as to be set forth; but then all the terretenants of the land out of which the rent issues must be brought before the court, the better to enable it to make a complete decree. And where the grantee does not know what lands are chargeable, either through a confusion of boundaries or any other cause, this court will decree payment against the person of the tenant, or will determine the abuttals so as to render the power of distress avail-

But where ~~not~~ a court of equity will grant such relief as suits the necessities of the case.

(a) *Palmer v. Whittenhall*; 1 Ch. C. 184.

(b) *Davy v. Davy*, 1 Ch. C. 144.

(c) *Champernoon v. Gubbes*, Pr. C. 126; 2 Vern. 382.

(d) 1 Atk. 598.

(e) See Litt. R. 103, *Cocks v. Foley*, 1 Vern. 359.

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able. (a) If there be no lands, of course the remedy by distress is not open, but where they are insufficient, redress will be obtained in this court. As where there was a devise of an annuity of 20*l.* per annum out of a rectory, with a clause of distress; the glebe belonging to the rectory being only worth 20*s.* per annum, and the tithes not being subject at law to a distress, there was no sufficient remedy there. Whereupon the grantee brought his bill in equity to have the whole rectory made liable. It was objected that the deviser had pointed out what remedy he intended, and that it should be taken as by law it might. But the court decreed that the whole rectory should be liable to pay the annuity, and that the defendant, the deviser's heir, should pay the arrears and costs. (b)

Where the
grantee's title is
merely equitable.

Again, where the grantee has an equitable title only, and not a legal, as the cestui que trust, or the assignee of an annuity bond, or the equitable purchaser of a rent, a suit is maintainable in a court of equity; but where the grantor or the landowner is not a party to the plaintiff's title, the remedy against him will not be altered, but must remain as it was when the rent or annuity was granted. (c) The relief given is usually the conferring upon the party suing in equity a legal character, by directing a legal conveyance, or the compelling the party who has the legal character to suffer proceedings at law to be carried on in his name. So if the grantor has charged a fund over which he has no legal control, a suit is maintainable against his trustees, as in *Floyer v. Sherard*. (d) There the grantor was entitled to the dividends of certain bank stock, which stood in the names of trustees, and charged the same with an annuity.

(a) *Collet v. Jaques*, 1 Ch. C. 120; *Boreman v. Yeat*, cit. in 1 Ch. C. 145; *Eton Coll. v. Beauchamp*, 1 Ch. C. 121. See also *Duke of Leeds v. Powell*, 1 Ves. S. 172; *Duke of Bridgewater v. Sir F. Edwards*, 6 B. P. C. 368, ed. To.

(b) *Dr. Thorndike v. Allington*, 1 Ch. C. 79.

(c) *Boreman v. Yeat*, cit. 1 Ch. C. 145; *Whitfield v. Fausset*, 1 Ves. S. 387.

(d) *Amb.* 18.

Lord Hardwicke sustained a bill filed in equity by the grantee against the trustees to have the arrears and accruing payments secured. He observed, "There is no way of coming at the dividends but in this court, being equitable estate in the defendant, and therefore it is not coming into this court for assistance, but, as it is a grant of an equitable estate, it is necessary to come into this court."

This court also will compel the grantee's trustee to proceed and enforce the payment of the arrears from the grantor, if he refuse or decline to pay; and will not require an indemnity to be given to the trustee. (a)

But these rules seem greatly extended by a late case in the Exchequer, where the power which a court of equity possesses over all real property was adduced to support the jurisdiction over rent charges. Thus that court has a means of enforcing payment of charges upon the estate, by decreeing a sale or mortgage of the whole, or a part, according to the exigencies of the case. It may, therefore, undoubtedly be more advantageous for parties entitled to the arrears of a rent, to sue in a court of equity, with the object of procuring a satisfaction of such arrears by the usual mode, which is there adopted for the liquidation of incumbrances. It was accordingly holden in *Cupit v. Jackson* (b) to be no answer to a bill for relief, that by possibility there is a remedy at law. If that remedy be uncertain, and it be a more convenient and effectual course to proceed in equity, a bill will be entertained. In that case an executrix filed a bill to have payment of the arrears of a rent charge due to her testator, by sale or mortgage of the premises charged, and such relief was decreed to her, though she might have distrained, or probably have had an action of debt under the statute 32 Hen. VIII. c. 37.

It is said by Lord Hardwick, also in *Anon. C. 2. Atk. 61.* (c) "That where the deed of grant of a rent charge is lost,

(a) *Cook v. Wiggins*, 10 Ves. 191.

(b) *M'Cl.* 495, 13 Pri. 721.

(c) See also *Lightbone v. Weedon*, 1 E. C. A. 24.

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a copy cannot be read at law, because there must be a profert in curia in the declaration, therefore, the party claiming it must bring his bill in equity to be relieved against the accident of the original's being lost." It was at that time generally considered that the practice of the courts of law was as is here represented, but it is well known that that was decided (a) not to be the correct practice of the courts of law, and that the profert of a lost deed may be excused in the pleadings. The courts of equity have, however, considered that this was a departure from what is the strict rule of law, and have not ceased to admit bills for relief on the accidental loss of deeds. (b)

Some kind of
relief specified.

Assuming, then, that there is no sufficient remedy at law, and therefore that a suit in equity is maintainable, the actual remedy required will depend upon the circumstances of each particular case, it is therefore impossible to make any distinct enumeration of the various bills which the grantee may have occasion to file. Some idea, however, may be formed from the cases already discussed, and hence it may be seen that bills will lie for an account where there are arrears against trustees, or in any case where a court of equity undertakes the adjustment of accounts; for a partition of lands, so that they may be rendered subject to distress; for the definition of the rent, become uncertain and obscure from long lapse of time; or to confer on a party a legal character, so as to enable him to resort to his legal remedies; in short, for relief generally when there is not an adequate or certain relief at law.

This court will sometimes appoint a receiver to collect rents and pay incumbrances, where the owner of the land does not consent to do it. As where the grantor of an annuity which was charged equitably on lands subject to prior charges went abroad, but left his agent in the receipt of the rents and profits, the Lord Chancellor, on an application by the grantee of the annuity, appointed a receiver

(a) In *Read v. Brookman*, 3 T. R. 151.

(b) *Toulmin v. Price*, 5 Ves. 238.

to collect the rents and pay the incumbrances, though the grantor had not appeared to the suit. (a)

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Where there have been long arrears, and the Court decrees payment of them, a question arises regarding interest, whether or not it should be added to the amount of the arrears; such has been claimed, and in some former instances granted. Though various cases have occurred, and many distinctions have been made, and sometimes admitted, the general principle of law is, that where the parties make no provision for interest in their contract, none can be allowed: and this principle has been frequently acted upon in this contract. A difference was formerly made where the annuity was granted for the maintenance of the grantee, and in consequence of its non-payment the grantee had been compelled to borrow money; there it was thought fair that interest should be allowed. But in the two cases of *Tew v. Earl of Winterton*, (b) and *Cruise v. Louth*, (c) the subject was examined and considered at great length, and all the previous cases having been reviewed, the claim was rejected, and the allowance was confined strictly to those cases where it could be inferred from the contract that the parties intended interest should be payable.

Interest not allowed upon arrears.

But as the legal principle depends upon this reason, that the creditor should proceed against his debtor speedily on the accruing of the debt, and shall not recover interest on his own delay, the Court will not allow its interference to work an injury to the grantee when he does proceed at law. Hence, where there was an effective fund, and the grantee had power to compel payment, but had not exercised it; and when she did attempt to do so was restrained by a bill for an account, and by an injunction thereon, the Lord Chancellor allowed interest on the arrears which accrued subsequent to the filing of the bill. (d) And, later, Lord

Except where delay is caused by the act of the Court.

(a) *Tanfield v. Irvine*, 2 Russ. 149; see also *Pritchard v. Fleetwood*, 1 Mer. 34.

(b) 3 B. C. C. 493; 1 Ves. J. 450.

(c) 4 B. C. C. 187, 316; 2 Ves. J. 157.

(d) *Morgan v. Morgan*, 2 Dick. 643.

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Manners granted interest on the arrears of a rent, where the grantee had been restrained by the Court from proceeding to enforce his right in a court of law. (a)

Upon the construction of the intention of the parties as to the allowance of interest, *Bell v. Free* (b) may be consulted. There two joint grantors of an annuity covenanted with each other that each should pay a moiety, and be indemnified against all actions, suits, costs, charges, demands, sums of money, and expenses which might be incurred by reason of the non-payment thereof. One having been compelled to pay the whole annuity claimed interest on the moiety, which was to be reimbursed to him, but it was refused.

The Court will not appropriate a fund if the contract has been completely executed.

It was shown on a former occasion (c) what security will be required where a court of equity enforces an agreement to grant an annuity. But if the grant have been perfected, and be completely executed, the Court will not travel out of it, and where no fund has been charged, it has refused to appropriate any to secure the due payment. (d) Yet, where a testator charged the residue of his personal estate with an annuity of 40*l.* to be paid quarterly, the Lord Chancellor ordered a part of the personalty to be brought before the Master, sufficient to secure the annuity. (e) And also where an executor had submitted it to the Court whether he should give any security, and seemed to have expressed himself in words threatening to defeat the annuity, it was referred to the Master to set apart a portion of the personalty to a trustee to secure the annuity. (f)

Where there was a suit in equity against an executrix, who claimed an annuity under the will, the Lord Chancellor permitted the arrears to be paid to her, although no report of debts had been made, she swearing by her answer that all the debts she was aware of had been satisfied. (g)

(a) *O'Donnell v. Browne*, 1 B. & B. 262.

(b) 1 Swa. 90.

(c) Page 246.

(d) *Cook v. Wiggins*, 10 Ves. 191.

(e) *Slanning v. Style*, 3 P. W. 336.

(f) *Batten v. Earnley*, 2 P. W. 163. See also *Lynor v. Mills*, 2 Sch. & L. 338.

(g) *Skinner v. Sweet*, Coop. 54.

In regard to the parties to the suit, it will be remembered that Lord Hardwicke stated, that the bill, if filed, must be filed against all the terretenants of the lands liable to the charge. (a) The same rule is repeated by Lord Eldon, (b) and he gives this reason, that complete justice may be done, and the question be tried in the presence of all who are interested, with reference also to contribution among them; admitting, however, that some cases are to be found under circumstances making the rule impracticable, or inconvenient in a degree almost arising thereto, and those circumstances have then induced the Court to dispense with that rule.

An instance of this exception occurs in 1 E. C. A. 74. (c) There one Barnard Spark devised an annuity, and gave all the rest of his real and personal estate to his brother John. John during his life paid the annuity, and made his will, charging all his real personal property with the payment of this annuity. He had an estate in England which had been Barnard's, and which he devised to two daughters; he had also an estate in Barbadoes, which he devised to two other daughters. For some time the daughters in England paid the annuity, but discontinuing to do so, a bill was filed against them alone. It was objected that the parties in Barbadoes ought also to have been joined, because, though at law the grantee may take his remedy against which he pleases, yet in equity all must be parties that right might be done to all, and perhaps the others might have satisfied the annuity. But the Lord Keeper held, that though it may be so when it is easily done, yet here it was impracticable, and that if there had been any satisfaction by those in Barbadoes it lay on the defendant to show it.

In cases of public charities, as there is some relaxation of the strict rules of practice in equity with regard to them, there has also been an opinion that they are not subject to

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Who are to be parties to the suit.

Exception in the case of charities.

(a) Above, in page 411.

(b) Attorney-General v. Jackson, 11 Ves. 367.

(c) Quintine v. Yard,

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this. Indeed, it is stated in two cases, *Attorney-General v. Shelly*,^(a) and *Attorney-General v. Wyburgh*,^(b) that in the case of a charity all the terretenants need not be made parties, and it is added in the former case, that the defendants may, if they seek contribution, undertake to make the other terretenants parties to the information, or help themselves by such course as they think fit. But both these cases have been questioned in a later case before Lord Eldon,^(c) and the proposition must not perhaps be taken quite so broadly. The result seems to be, that *prima facie* the charity may sue without making all of them parties. If the defendant insist there are other parties, and points out who they are, and will undertake to enable the relator to make them parties, they shall be made parties; but if they be not known, and cannot be pointed out or described, then the Court will not stop the proceedings against the individual actually sued, but will go on to determine his liability; and will then direct inquiries, if he desire it, as to what other, if any, lands are also chargeable, and perhaps, though this is not determined, will not compel the payment until the result of the inquiry be obtained.

See the new statute, 2 & 3 Will. IV. c. 57,^(d) for the remedy provided for the cases where the trustees for charities die without known heirs.

Recovery of the consideration when the annuity proves to be invalid.

Hitherto in this discussion upon the grantee's remedies, the annuity has been assumed to be valid and in force. But it is now necessary to consider the consequences when the annuity is void and invalid. It may be void on a variety of grounds, as may be gathered from the previous parts of this treatise, but except in the cases of pecuniary annuities seldom can the grantee sustain such an injury as to give any right to claim a legal remedy. It will not be forgotten that where a sum of money is advanced for the purchase of an annuity, the grant thereof must be duly registered, and if there be any deviation from the regulations

(a) Salk. 163.

(b) 1 P. W. 599.

(c) *Attorney-General v. Jackson*, 11 Ves. 365.

(d) Above, p. 54.

imposed by the annuity acts, such grant is void, and the annuity may be set aside. When that happens, the grantee will have advanced his money for a consideration which fails, and though that might be endured, if fraudulent persons alone suffered thereby, yet it was soon found that these statutes operated upon the innocent with as much effect as upon the guilty. Transactions in every respect fair and honourable were not unfrequently defeated through inadvertence or mistake and misapprehension. Hence the general principle of law, which enables a party to recover money advanced upon a consideration which fails, was holden to apply to annuities invalidated by the Annuity Act. Perhaps the first case was *Shove v. Webb*, (a) where an annuity granted in liquidation of a previous debt, and in consideration of a sum of money also supplied, having been set aside for an inaccurate description of the consideration in the memorial, the grantee brought his action for the consideration; that is, for the goods he had supplied, and also for the money, and it was determined that he might recover. Ashurst, J., observed in his judgment, "In regard to the money paid as part of the consideration, as the security is not set aside for any fraud in the transaction, but merely for a mistake or omission of form, it becomes unconscientious in the party to retain it, and it is therefore recoverable on the count for money had and received to the plaintiff's use." This decision has been frequently acted upon since, although Lord Eldon has expressed some doubt as to its original soundness, (b)

But before the grantee can claim to recover the consideration money the annuity must have been vacated, or, at least, the grantor must have refused to pay the annuity, or to execute valid securities on an application by the grantee. This was so held by Lord Kenyon, in a case of *Weddell v. Lynam*, (c) where neither of these had occurred, and the plaintiff was nonsuited. In a subsequent action, brought by the same plaintiff, (d) he proved that he applied to the

The annuity must have been vacated, or the grantor must have refused to execute a valid annuity.

(a) 1 T. R. 732.

(c) 1 Esp. C. 309.

(b) In *Bromley v. Holland*, 7 Ves. 23.

(d) 2 Peake's Cases, 30.

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grantor for fresh securities, but could not procure them, and also to the surety, who promised to execute them when the grantor had done so. It was contended that he ought to have filed a bill in Chancery to compel the specific performance, or have tendered back the void securities. But Lord Kenyon decided that he was then entitled to maintain the action, saying, "I do not say that it was necessary for the defendant to put every thing in the same form as before, for if the surety had withdrawn himself from his obligation, and the defendant had got another responsible person, that would have been sufficient; but not having done so, he must return the money." It is immaterial whether the grantor will not or cannot execute the fresh securities, the consideration is still recoverable. (a)

The adjudication of a court of law is not however required.

The grantee is not bound to wait for the adjudication of a court upon his securities, for if the grantor has in any way pressed the objection, and endeavoured to avail himself of it, it seems enough. Thus, where the defect was pleaded to an action on the bond, and the grantee entered a *noli pros.*, Lord Kenyon held him entitled to sue for the consideration forthwith. (b) And the case of *Waters v. Sir W. Mansell* (c) was still stronger. There an annuity had been paid for some time, and then fell into arrear; the grantor's mother informed the grantee that there was a defect in the memorial, and that therefore the annuity was void, but offered a compromise. To this, according to the finding of the jury, the grantor also assented. It was held, that the grantee might recover the money advanced for the purchase of the annuity, although there was no other act done to determine it, and he neither tendered fresh securities to be executed, nor delivered up the old. It was, indeed, necessary for him to retain these, as C. J. Mansfield observed, to establish his case.

Where there are several securities, and any one of them is vacated, the grantee may recover back his consideration,

(a) *Richards v. Borrett*, 3 Esp. C. 102.

(c) 3 Taunt. 56.

(b) *Este v. Bromhead*, 3 Esp. C. 261.

especially where the other instruments are voidable. (a) "For," says Lord Ellenborough, "the plaintiff contracted for one entire assurance, consisting of several securities, and he has a right to have that assurance entire, or to have back his money. The defendant has taken away one of his securities, and therefore the consideration for the money has failed."

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The contract between the parties is for an annuity during the life of the annuitant, and so long as that life exists the contract is executory, but when it ceases the contract becomes executed. And hence, if the annuity be not vacated while it is executory, the grantee or his representative cannot after the death of the annuitant claim the consideration, or the balance, supposing it not to have been satisfied by the annual payments. (b)

Cannot be recovered after the death of the annuitant if the annuity has not been previously vacated.

But this is an equitable action, and is therefore granted subject to all the equities which may arise from the circumstances of the case. Accordingly, it was decided that the surety of the grantor cannot be called upon to refund the consideration to the grantee, which was paid with his knowledge to the principal only, and for his sole benefit. (c) Mr. Justice Ashurst, however, guided by the particular facts of the case, thought the surety should have been liable, but the other two judges, Buller and Grose, proceeded on the general rule, and decided against him. It is admitted that the defect in the inrolment arises from the neglect of the grantee, and equity, if not law, always relieves the surety from the neglect of the creditor. Where, however, a surety applied to the court to be allowed to avail himself of certain payments made by the grantor, and this was admitted upon his entering into a rule to pay the balance, the Court refused to discharge him from his liability under this rule, though the grantor succeeded in setting the annuity aside for a defect in the memorial, subject to the

The consideration is not recoverable from the surety.

(a) *Scurfield v. Gowland*, 6 East, 241; 2 Smith, 332. *Este v. Bromhead*, 3 Esp. C. 261.

(b) *Davis v. Bryan*, 6 B. & C. 651; 9 D. & R. 726.

(c) *Straton v. Rastall*, 2 T. R. 366.

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The grantor may
 set off the pay-
 ments made by
 him.

terms of his paying the balance of the consideration money and interest, which he had not done. (a)

So also it is now established, that as the plaintiff treats the original consideration as a sum of money lent or advanced to the defendant, so the latter may claim to set off the different payments made by him as portions of that sum returned, and the plaintiff can only recover the balance. In one case, (b) indeed, where the annuity being void the parties agreed to rescind it, and the grantor agreed to repay the consideration money, Lord Kenyon would not allow him to set off two yearly payments which he had made, holding the plaintiff entitled, both under the agreement and according to the justice of the case, to the whole consideration, and interest from the time the annuity ceased.

But it was afterwards decided by the Court of King's Bench that the grantor may set off the payments made by him. And where the Statute of Limitations is not replied to the plea, he may set off all the payments he has made, even though they may have exceeded six years. (c) Lord Ellenborough said, "This was either an annuity or not an annuity. If not an annuity, the sums paid on either side were money had and received by one party to the other's use. If the consideration of the annuity be money had and received, it must be money had and received with all its consequences, and therefore the defendant must be at liberty to set off his payments as such, on the same score. In the case cited, (*Beauchamp v. Borrett*,) Lord Kenyon's opinion might have proceeded on the particular circumstances of it, and that seems probable from the stress which he laid on the justice of the case." Indeed, where the annuity had been vacated, and there was no agreement on the part of the grantor to rescind, Lord Kenyon himself permitted the grantor to set off the payments he had made

(a) *Williamson v. Goold*, 8 Moore, 109.

(b) *Beauchamp v. Borrett*, Peake, C. 109.

(c) *Hicks v. Hicks*, 3 East, 16.

on account of the annuity, and all expenses he had incurred on it. (a)

It has not been actually determined that the Statute of Limitations can be given in answer to the defendant's set off, so as to restrict him to six years' payments only. Lord Ellenborough, in *Hicks v. Hicks*, held that the plaintiff could not take advantage of it, not having pleaded it. If, however, it be available, it seems to put the defendant in a worse situation than the plaintiff, in taking the account between them, inasmuch as the plaintiff may go back any distance of time, while the defendant can only set off six years' payments. But perhaps it would be open to the defendant to plead that statute to the plaintiff's demand; and it can hardly be contended that the annual payments are to be taken as acknowledgments of the continuance of the debt, for they are not held in law to be payments of interest; indeed, they are too high for that. The proper course would be undoubtedly to allow *all* payments to be set off to any extent.

If such redress can be obtained in a court of law on a defective inrolment, it will readily be believed that a court of equity will not grant less extensive relief, but there are some few matters connected with this relief which will come more aptly in the ensuing chapter.

In consequence of the great care which a court of equity takes of the interest of married women, where a wife entitled to a separate estate charges it with the payment of an annuity, which the grantee neglects to inrol, and thus the annuity becomes void, a bill cannot be maintained against her for the consideration money, (b) even though the money advanced may have been expended on her separate estate. (c) Nay, on a bill of interpleader filed by the owner of the estate charged with the separate property, when money is paid into court by the plaintiff, payment of the consideration

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How far the
Statute of
Limitations is a
defence.

Similar redress
in a court of
equity.

But the con-
sideration is not
recoverable from
a married
woman.

(a) *Weddell v. Lynam*, 1 Esp. C. 309.

(b) *Duke of Bolton v. Williams*, 2 Ves. J. 138.

(c) *Jones v. Harris*, 9 Ves. 486.

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will not be directed thereout. (a) These cases proceed on the guardianship holden by courts of equity over the rights of married women, which renders them incapable of contracting or entering into any general engagement while under coverture. The disposition of her property which she intended was the grant of an annuity, but that is void, and the Court cannot presume another disposition for the payment of the consideration, for which she has expressed no intention.

Where a wife pledges her separate property jointly with her husband for an annuity granted by him, she stands in the place of a surety, and then undoubtedly she would not be liable for a defect in the memorial, as shown in regard to other sureties.

There is no equitable lien on a fund intended to be charged where, however, the charge is invalid.

Where the parties have intended that a particular fund should be charged, but the charge thereon fails through defect of enrolment, there is no equitable lien on that fund for the consideration money. "It is impossible to contend with effect," said Lord Eldon, "that the annuity being under the statute void to all intents and purposes, the fund upon which the annuity was to be charged should become liable, in the nature of a mortgage, for the consideration paid for such annuity. In ordinary cases clearly it could amount to nothing more than a personal demand." (b)

Cases where the grantee seeks to vacate the grant.

But there are cases, as already intimated, where the grantee seeks to set aside the annuity. Such are perhaps all of them instances of fraud or imposition, where a party has been induced to give up valuable rights or property in consideration of some inadequate annuity. Where fraud or deception has been employed, or where the principles and rules applicable to contingent and reversionary interests, discussed above in the chapter on the consideration, may be brought to bear on the transaction, the grantee may apply to a court of equity for relief; and if the case be established, the annuity will be vacated. One strong in-

(a) Angell v. Hadden, 2 Mer. 169; Aguilar v. Aguilar, 5 Madd. 418.

(b) Jones v. Harris, 9 Ves. 496. See Davis v. Duke of Marlborough, 2 Swa. 166; Aguilar v. Aguilar, 5 Madd. 414.

stance occurred before Lord Eldon, in *Gibson v. Jeyes*, (a) who set aside an annuity which had been sold to an old lady, infirm in body and mind, at the age of seventy-one, by her attorney, at an inadequate price, on the ground that he had not used that extreme degree of caution and diligence which the connection between the parties required. Other examples are referred to in the chapter cited.

It is difficult to point out any mode by which the grantee can at law vacate the grant, unless it be by treating it as a nullity, and proceeding to claim back that which he may have paid or conveyed as the consideration of the grant. In which case, however, many of the rules which prevail in a court of equity will not be applicable.

(a) 6 Ves. 266. See also *Lamplugh v. Cox*, 2 Dick. 411.

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CHAPTER X.

OF THE GRANTOR'S REMEDIES.

The remedies
for the grantor.

HAVING thus examined the grantee's remedies, the reader will now proceed to the consideration of those belonging to the grantor. Besides the division into his legal and equitable remedies, there is also another division, which runs through each of those branches, and is the ordinary common-law redress, and that attainable through the provisions of the annuity acts. It will be advisable in the present chapter to pursue each of these divisions.

1. Generally.
His legal remedies are mostly in defence.

For the most part the grantor's remedies exist in defence only. When he considers the claim of the annuity to be invalid, he may refuse to pay it, and defend himself against whatever proceedings the grantee may resort to. Thus, to refer to the last chapter, if a right of entry be insisted upon, he may hold the possession of the land and defend himself against an ejectment. If the grantee distrain his goods or cattle, he may replevy them, and bring an action of replevin, in which case, indeed, he fills the double capacity of actor and defendant. Should an assize, or an action of annuity, debt, or covenant be brought against him, he may avail himself of any of the objections arising out of the peculiar nature of those remedies, which may be learnt from the observations thereon in the previous chapter, and may also adopt any of the ordinary pleas or defences allowed in other cases. It was mentioned before (a) that a set off may be pleaded to an action on an annuity bond. And where a man had given a bond to pay the interest on 2000*l.* to his mistress for her maintenance and that of her children, Lord Hardwicke would not allow the interest to be claimed for the time during which he maintained her. (b)

(a) Page 402.

(b) *Lloyd v. Carter*, 2 Atk. 85. See also *Carter v. Anderson*, 3 Sim. 370.

The grantor may plead that he has paid the annuity, or that he has duly tendered it. If he conceive that any particular mode or place of payment has been required, and that he has fulfilled that requisite, he may, according to the nature of the security or of the remedy, plead either that the grantee has not followed the proper course, or that he had duly tendered the payment which had not been received. On which plea of tender, it is observable, that though where it is pleaded in the actions of annuity, debt, or covenant, the defendant ought to bring the money due into court, yet in replevin, where there is an avowry for a rent charge, and the plaintiff pleads a tender at the day, he ought not to bring the money into court, because the only question raised in that action is, whether the distress were rightly taken or not, and not whether the rent has been paid or not. (a)

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His plea of payment or tender.

It is also a general rule, that where there has been a tender which is not received, the creditor may make a subsequent demand, and if the money be not then paid, the tender will not bar the action. But a question is raised in that same case of *Horne v. Lewin*, whether, if the grantor hath tendered the rent on the day of payment, the grantee can afterwards demand it otherwise than of the person and on the land itself. The Court were not called upon to decide the question, and no resolution was given upon it. See farther upon the subject of the tender of the rent, *Bac. Abr. Rents*, I. 355.

How a subsequent demand should be made.

A tender before the day when the rent is due is not available, as was determined long since. A bond was given to secure an annuity to a man's wife, payable at Michaelmas or within one month after, at D. In an action on the bond, the defendant pleaded that two days before the end of the month, he came to D., and tendered the money, but that no one was there to receive it. And the Court, after deliberation, held it not to be a good tender. If he had met the obligee within the month, and had tendered it to him personally, it

(a) *Horne v. Lewin*, 1 Lord Raymond, 639; 2 Salk. 683; 12 Mod. 382.

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might have been good, but it seemed that the last day of the month was the proper day to offer and receive it. (a)

It is not enough to be ready to pay the money, but there must be an actual offer of it to the party entitled to receive it, and such must be stated in a plea of tender. (b)

To an action on an annuity bond the grantor may plead that he has lent money to the grantee, who has agreed that he may retain the amount out of the accruing payments, because this is equivalent with a plea of payment and satisfaction. And the bankruptcy of the grantee before the satisfaction of that sum will not make any difference, since the assignees must take the annuity with all its equities. (c)

Defect or want
of consideration
is no defence to
the action.

Though the grantor may plead fraud as an answer to a claim on the grant, he cannot plead a defect or want of consideration. Therefore, where the purchaser of an estate in fee granted a rent charge in payment thereof, it was held that he could not object at law, on a distress by the grantee, that the vendor had only an estate for life in the land, his remedy, if any, being in equity. (d)

The tenant of the land should not plead that the defendant, who avows as the bailiff of the grantee, distrained without the privity of the latter, but should traverse his being bailiff. (e)

May recover
possession of
the land by
ejectment.

If the grantee has succeeded in getting possession of land through the means of a grant of an annuity which the grantor maintains to be invalid, the latter, or those who have succeeded by assignment or descent to his interest, may raise the question by an action of ejectment to recover the possession.

Summary appli-
cations to the
courts to set
aside proceed-
ings.

And where the grantee has availed himself of the summary judicial process, upon instruments usually granted to secure the annuity, and has obtained possession of property, or has

(a) *Allen v. Andrews*, Cro. E. 73.

(b) *Beverstam v. Osborn*, 1 Vent. 322; 3 Keb. 800. 810. 828; *Horne v. Lewin*, above.

(c) *Sturdy v. Arnaud*, 3 T. R. 399.

(d) *Grilles v. Mansell*, Willes, 378.

(e) *Dobson v. Douglass*, 3 Lev. 20; *S. C. Robson v. Douglas*, Freem. 536.

enforced them in any manner whatever, the grantor may apply to the court out of which the process issues, to grant him relief, according to the nature of the transaction, which he discloses. The courts will proceed to examine the case in the exercise of their general control over such instruments, as proceeding under their sanction, became part of their own records, and will decide according to their judgment upon such examination. "But," said Lord Loughborough, "this principle is clear, that in judging of the transaction, which is the foundation of the judgment, they will find themselves governed by the same rules, which the law has prescribed, if the transaction itself, independent of the judgment, were before the court in the form of an action. We have not a greater latitude by having an authority over the judgment entered up, than in the decision of the question between the parties themselves." Therefore, where the grantee had died, the court refused to admit parol evidence of an agreement between the parties, that the annuity should be redeemable, where the deeds contained no such power, though judgment had been entered up on a warrant of attorney given to secure the annuity. (a)

The court, however, will impose such terms as appear to suit the justice of the case when they do interfere. Thus in a late case, where a warrant of attorney was set aside as being a charge upon a clergyman's benefice, and therefore prohibited by the 13 Eliz. c. 20, the Court of King's Bench referred it to the Master to ascertain what was due to the grantee for principal and interest at five per cent. and expenses, and all payments made to him under the annuity deed were ordered to stand good. (b)

Where the grantor has a legal objection to the grant, or has satisfied the demand, he may be contented with defending himself in a court of law against any proceedings which may be brought against him. But there are many cases where the objection cannot be at all, or only imperfectly, sustained at law, and is only properly available in a

Application to
courts of equity
for relief.

(a) *Haynes v. Hare*, 1 H. Bl. 662.

(b) *Flight v. Salter*, 1 B. & Ad. 673.

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court of equity; as particularly in the instances of inadequate contracts, and the sale of reversionary interests, or contracts by parties unfit, through mental incapacity, to engage in such transactions. Proper redress is then only attainable in a court of equity. What relief will be given depends upon the particular nature of the transaction complained of. Thus where proceedings have been commenced at law on the instruments, a bill may be brought for an injunction to stay them. A suit may be instituted to annul or vacate the grantor's grant by himself, or others interested through him, to obtain restitution of property, the possession of which he has lost through the grant, when there are difficulties in the way of proceeding at law; or to remove the effect of instruments which, though in truth invalid, may still operate injuriously upon his title. So he may seek to compel a redemption, or to have an account taken where it is complicated, and he alleges that he has overpaid the grantee. Lastly, he may defend himself in a suit filed by the grantee to enforce payment of the annuity, or to compel the execution of the contract, and bring forward his objections to the transaction, as he may also where a third party files a bill of interpleader, to have the right settled between the discordant claims of himself and the grantee, to property which he may have assigned as a security for the annuity.

A court of equity will not prevent the grantee from distraining on one landowner for the whole rent.

It has been stated (a) that where a suit is brought for a rent chargeable on several lands, the owner of any one, if sued alone, may object that the rest are not joined; and the suit will be abated, because it is not equitable that when several are liable, one only should be called on to discharge it. But this court will not interfere with the legal right of distress, nor prevent the grantor from distraining upon any particular land. Yet the landowner may in that case file a bill against the others jointly liable, to compel a contribution; and it is said in an old authority (b) that the grantor shall then be restrained from charging the whole rent upon the one alone.

(a) Page 417.

(b) Sir G. Cary's R. 3. 32. 132; 1 E. C. A. 33.

It must also be noticed that a court of equity entertains certain bills, technically termed *quia timet bills*, in which a person, entitled in remainder or reversion, seeks to compel the tenant in possession to pay the rent charged upon the estate so limited, in order that the arrears may not accumulate during the continuance of the particular estate, and fall upon the party next succeeding. Upon these bills the court makes such disposition as best suits the nature of the case. (a)

There is a case (b) where the land alone was charged, and the tenant for life died, leaving arrears. The Master of the Rolls decreed that his executor should pay the arrears out of his testator's assets, because his estate had been benefited by the non-payment.

The terms upon which relief will be given to the grantor vary with the nature of the relief claimed. Where a voluntary grant is set aside, of course the grantor can have nothing to repay to the grantee, and it is not found that the latter is called upon to refund the profits he may have received. But where there has been fraud, or undue influence amounting to fraud, the grantee has been directed to pay the costs. (c)

Where the grant has not been voluntary, but for a pecuniary consideration, which is grossly inadequate, nay, when there has been oppression and extortion on the part of the grantee, the Court of Chancery treats the bill of the grantor as a redemption bill, and therefore when it sets aside the annuity, decrees that the consideration originally advanced shall be repaid; for it would be contrary to equitable principles to allow the one to derive any advantage from a bargain, to which he was himself a party, and which he has sought to avoid, without a compensation to the other. And generally the grantee shall be allowed his interest on this principal. In one case, (d) the grantor was allowed to

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Remedies for
reversioners in
the land against
the tenant for
life.

Terms of relief.

Consideration to
be repaid with
interest.

(a) *Hayes v. Hayes*, 1 C. C. 223.

(b) *Eton Coll. v. Beauchamp*, 1 C. C. 121.

(c) *Norton v. Relly*, 2 Eden. 286.

(d) *Heathcote v. Paignon*, 2 B. C. C. 170.

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Premiums of
insurance.

deduct the payments which he had made while the annuity continued, from the sum thus to be refunded. And this appears to be equitable.

So also in that case, the premiums which had been paid by the grantee for the insurance of the annuitant's life, were directed to be allowed to him in the account, as had been previously done in *Lawley v. Hooper*, (a) by Lord Hardwick, and in *Gwynne v. Heaton*, (b) by Lord Thurlow. But when it is considered that the policy, although in strictness of law it ceases to be valid when the annuity determines, is nevertheless, by the general practice of the insurance offices, treated as an existing contract, and is still an object of sale, (c) it seems questionable how far it is right to charge these premiums upon the grantor, on redemption, because, as the grantee may ultimately obtain the benefit of the policy, he will by this decree compel the grantor to pay a portion, perhaps to a large extent, of his part of a collateral contract. It will be seen hereafter that this item has not been allowed when the annuity is set aside for a defect in the memorial.

Expenses of the
deeds.

Again: in the two cases of *Gwynne v. Heaton*, and *Heathcote v. Paignion*, the expenses of the deeds, which had been paid by the grantee, were ordered to be charged to the grantor, as in the case of mortgages the mortgagor usually incurs the expense.

Costs.

In regard to the subject of costs, where an annuity has been set aside, as fraudulently inadequate, the defendant has been allowed the costs of taking the account only, but no more. (d) Where, however, there has been an inadequate sale by a reversioner, and no fraud is proved, the grantee has been allowed his costs. (e) In *Davis v. Duke of Marlborough*, (f) where the plaintiff filed his bill to

(a) 3 Atk. 282.

(b) 1 B. C. C. 1.

(c) *Barber v. Morris*, 2 M. & M. 62; *Ashley v. Ashley*, 3 Sim. 149.

(d) *Lawley v. Hooper*, 3 Atk. 282; *Gwynne v. Heaton*, 1 B. C. C. 1; *Heathcote v. Paignion*; 2 B. C. C. 170.

(e) *Peacock v. Evans*, 16 Ves. 518; *Gowland v. De Faria*, 17 Ves. 20; *Marsack v. Reeves*, 6 Madd. 110.

(f) 2 Swa. 157.

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enforce the annuity, and the defendant by his answer objected that the bargain was oppressive, and that he was an expectant heir, and tendered the principal advanced and interest, which the plaintiff accepted, the Lord Chancellor refused the latter his costs. So in *Ryle v. Swindells*, (a) where the vendor filed a bill for a like purpose, which was refused on the ground of the inadequacy of the price, the bill was dismissed without costs. And in *Hinxman v. Smith*, (b) where there were cross suits, no costs were allowed in either. Perhaps, however, the only rule which can be stated is, that there is a discretion on this subject, which will be exercised according to the merits of each particular case.

Where different grantees distrain on the land for their annuities, and the tenants file a bill of interpleader to settle the rights and priorities of the former, and bring their rents into court, they shall have their costs immediately out of that fund. (c)

Bill of interpleader between different grantees.

It is also a part of the decree that the securities given shall be vacated and annulled, and, where necessary, new conveyances will be directed to be executed. (d)

But the grantor is indebted to the provisions of the annuity acts for the introduction of the most important redress, both in the courts of law and equity. The regulations imposed by those statutes, as regard the inrolling and registering the memorial; and the prohibitions of certain fraudulent practices, to which this contract was exposed, have been already discussed, and it remains here to consider the remedies created by them.

Remedies under the annuity acts.

It may often happen that the grantor may have no copy of the instruments by which he has bound himself. By the regulations of the first annuity act, coupled with the interpretations of the courts upon it, the memorial contained almost a complete transcript of the securities, whence the

Copy of the instruments how to be obtained
53 Geo. III.
c. 141. s. 5.

(a) *M'Clal.* 519.

(b) 3 *Russ.* 436. See also *Bowes v. Heap*, 3 *Ves. & B.* 117.

(c) *Aldrich v. Thompson*, 2 *B. C. C.* 150.

(d) *Underhill v. Horwood*, 10 *Ves.* 219.

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grantor could obtain all the information he might want. But by the 53 Geo. III. c. 141, the memorial has been reduced to a mere index of the contents, and a provision has therefore been introduced, to afford to the grantor such information, which is as follows :—It is enacted in sect. 5, “ That in case any person or persons, by whom any annuity or rent charge, of which such particulars as aforesaid are hereby required to be inrolled, shall for the time being be payable, shall be desirous of obtaining a copy of every or any deed, bond, instrument, or other assurance, whereby such annuity or rent charge was granted, and of such his, her, or their desire, shall give twenty-one days notice in writing to the person or persons for the time being entitled to such annuity or rent charge, such person or persons shall, on or before the expiration of such twenty-one days, unless prevented by fire or other inevitable accident, and in that case, if the assurances shall not be destroyed by such accident, then as soon after as such impediment shall be removed, send or deliver to the person or persons requiring the same, a copy of every deed, bond, instrument, or other assurance, whereby such annuity or rent charge was granted, or of such of the assurances as in such notice shall be required, and such last-mentioned person or persons shall at the time of receiving the same pay to the person or persons furnishing the same, a sum after the rate of sixpence for every one hundred words contained in every such copy, and also the reasonable costs of sending or delivering the same, and the person or persons holding the original instruments by which such annuity or rent charge shall be secured, shall suffer the person or persons to whom such copies shall be delivered or sent to examine the same with the originals; and in case such copies shall not be sent or delivered, or the person or persons holding the original instruments, shall refuse to suffer such copies to be examined therewith, according to the direction in this act, it shall be lawful for the person or persons by whom the annuity or rent charge is payable, to take out a summons from any of his Majesty's justices of his Courts of King's

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Bench and Common Pleas, requiring the person or persons neglecting to send or deliver such copies, or refusing to suffer the same to be examined with the original instrument as aforesaid, to appear before such judge, and shew cause in the premises, and it shall and may be lawful for the judge, before whom such person or persons shall be summoned, to make such order for the production of the instruments by which such annuity or rent charge shall be secured, and for suffering the complainant to take copies thereof and examine the same, or the copies delivered with the original instruments and otherwise in the premises, as to such judge shall seem meet."

It will be remembered that the first section of the 17 Geo. III. c. 26, and the second sect. of the 53 Geo. III. c. 141, have enacted, that if a memorial be not duly inrolled according to the regulations contained in those acts, the deed or assurance shall be null and void to all intents and purposes. So also by the third section of the former, and the fourth section of the latter, certain matters are required to be stated in the deeds or assurances, otherwise the same shall be null and void. Hence in whatever manner the grantee may attempt to enforce his grant, the grantor may object that these statutes have not been duly observed in the same manner as any of the common law objections lately referred to. And in fact it is common for a defendant, when sued on an annuity deed, to plead specially that there has been no memorial registered, or that the memorial is defective. To which pleas, however, it will be right to give some consideration. The memorial is not universally required, it is only so where the consideration is pecuniary, or money's worth. That is expressly provided for by the last sections of the two statutes, but it is also apparent from the perusal of the whole of the acts, and there is an implied restriction in the clauses which impose the necessity of the memorial, of its application to such contracts only. (a) Hence, according to the general

Objections on
the annuity
acts; plea of
non-inrolment.

(a) *Horn v. Horn*, 7 East, 529; 3 Smith, 523.

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 pleaded.

rule of pleading, that where a party would avail himself of a restricted defence, he must bring his case within the restriction, it is incumbent upon the grantor, when he pleads that no memorial has been registered, to aver that the consideration was pecuniary, unless indeed that be apparent from the instruments, as they are set forth in the declaration or on oyer.

If the grantor plead that there is no memorial, the grantee must set out the memorial in his replication or plea in bar; it is not sufficient for him to join issue upon the denial; (a) and it will not be improper for him to conclude his pleading by referring to the record in his verification, as he need not conclude to the country. (b)

When the grantor would object that the memorial is defective, it has been said that he must not plead that there is no memorial, as it would be a departure afterwards to state that the memorial was defective. This opinion has arisen from a case of *Praed v. Duchess of Cumberland*, (c) where the defendant pleaded that there was no such memorial as was required by the act of parliament, to which the plaintiff replied by setting out a memorial, and the defendant in the rejoinder alleged that the memorial stated a fact untruly. It was held by the Court of King's Bench that the rejoinder was bad, inasmuch as it was a departure from the plea, since it admitted the existence of the memorial which was there denied. A writ of error was brought, and this judgment was affirmed in the Exchequer Chamber, but C. J. Eyre did not adopt the same argument as the Court of King's Bench; for he decided that the objection taken to the memorial was properly an objection to the deed, and not to the memorial, and therefore there was clearly a departure. The King's Bench proceeded on the analogy of an award, in which case it was said, that if the defendant plead no award, and the plaintiff reply by setting out an award, the rejoinder pointing out an illegality

(a) *Richardson v. Tomkies*, 9 Bing. 51.

(b) *Ib.*

(c) 4 T. R. 585; 2 H. Bl. 290.

or defect therein would be a departure; but this has since been determined otherwise in *Fisher v. Pimbley*, (a) on this principle, that an invalid award is the same as no award, and therefore the rejoinder supports the plea rather than departs from it. So it may be submitted that an invalid or illegal memorial is the same as no memorial, and the pointing out a defect therein is not a departure from the plea of the non-existence of a memorial, that is, of a valid memorial. If the plaintiff set forth a memorial plainly defective in itself, it cannot be said that the defendant may not demur, and yet that must be the effect of holding the decision in *Praed v. Duchess of Cumberland* to the extent alleged in the Term Reports.

Mr. Justice Ashurst, in his judgment in that case, says, (b) "the proper course is for the defendant to plead the memorial, and to show in what particular it is defective." When this is done, it must be averred that no other memorial has been inrolled; and it is not enough to allege generally that the memorial is not good and sufficient according to the form of the statute, but it seems the particular defects should be expressly declared, (c) and it should also be stated that the consideration for the grant was pecuniary.

If the grantee would excuse the non-registration upon any other ground than the nature of the consideration, it lies upon him to plead it, because the exceptions are all contained in a different section of the act.

But not only is the objection raised in an action by the defendant's pleading, but it is also available when the grantee proceeds to enforce those securities which are summary in their process, and where judgment is signed without the actual intervention of the Court. If these instruments have not been duly inrolled, on application to the Court they will be set aside, and all the proceedings that have been taken upon them. And this is not discretionary with the Court, they are bound by the act to vacate the instrument. (d) At the same time, it seems, the Court may

How the objection is to be taken on summary applications.

(a) 11 East, 186.

(b) 4 T. R. 588.

(c) *Simmons v. Hunt*, 1 Marsh. 155.

(d) *Metcalf v. Bowes*, 5 B. & C. 250.

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impose terms upon the party applying for its interposition, probably on this ground, that as the judgment signed on the warrant of attorney is supposed to be void, the whole proceedings under it would be invalid, and the grantee would be a trespasser, against whom, indeed, the grantor might bring an action; but the summary remedy on application to the Court is preferable, and he is willing to submit to the terms which may be imposed for its interference. In *Poole v. Cabanes*, (a) the warrant of attorney was cancelled, the defendant agreeing to return the principal on taking an account before the Master. So in *Drake v. Rogers*, (b) the Court of Common Pleas imposed that term on the grantor. And very lately, where the grantor had requested the judgment to be entered up, and execution to issue, which he afterwards procured to be vacated for a defect in the memorial, the Court of King's Bench made his rule absolute only on payment of all the costs of the judgment, execution, and sequestration, and of that motion, as between attorney and client. (c) Indeed, as the money advanced is recoverable by an action, the parties generally, if they can pay the money, will find it advisable to refer to the Master to compute what is due for principal and legal interest, in taking of which account the practice is to allow the principal with five per cent. interest, the grantee accounting for the money which has been received upon the annuity. (d)

But the Court have refused to order the warrant of attorney to be taken off the file, or to be delivered up to be cancelled, (e) yet they ordered it in one case to be deposited with the officer of the court. (f)

When the
Courts will in-
terfere.

And the Courts will not interfere summarily on motion except there is a warrant of attorney, or some instrument, which forms a part of their records. The grantor is left to his plea or the ordinary remedies in other cases. Hence, the Court of Common Pleas refused to cancel an

(a) 8 T. R. 328.

(b) 2 Br. & B. 24; 4 Mo. 402.

(c) *Nash v. Godmond*, 1 B. & Ad. 634.

(d) *With.* on Ann. p. 103.

(e) *Anon.* 2 Chitty, 34.

(f) *Denne v. Dupuis*, 11 East, 134.

annuity bond which was defectively inrolled, and doubted whether they would have stayed proceedings in an action thereon. (a) And the Court of Exchequer afterwards decided, that the proceedings could not be stayed, it being similar to any other instrument of disputed validity; which must be determined by the judgment of the Court in the regular course of proceeding. (b) Even where there is a warrant of attorney, that alone will be vacated on a summary application; the other securities will not be touched. (c) It is easily seen that by cancelling the other securities the grantee would be deprived of an opportunity of having the judgment of the Court revised on a writ of error. This was decided formerly, when there was great doubt whether a defect in the memorial of one instrument did not vitiate all, but it has now been settled in the negative, and therefore of course the defective memorial of the warrant of attorney could not now give a power to the Court to vacate the other instruments where the error does not apply.

Where an objection was taken to the memorial as being defective, and the point was doubtful, the Court of King's Bench enlarged a rule for setting aside the warrant of attorney until the parties had brought an action on the bond to try the validity of the objection, which might then be raised in a more solemn manner. (d)

It has been seen above, in page 114, that any party whose property is affected by the operation of the annuity may avail himself of the objections arising from these acts. Who may apply.

But as to a summary application to the Courts, it was determined that a purchaser of a lease, after the grant of an annuity secured thereon, but not duly inrolled, could not apply to the Court of King's Bench to have the instruments which secured the annuity cancelled; but the grantor alone was entitled by reference to the language of the 4th sec-

(a) *Symonds v. Coburne*, 1 B. & P. 482.

(b) *Jeffrey v. Duke of Athol*, 3 Anst. 865, n.

(c) *Appleby v. Smith*, 3 Anst. 865; *Chawner v. Whalley*, 3 East, 500; *Storton v. Tomlins*, 2 Bing. 475; 10 Mo. 172.

(d) *Eastland v. Forrester*, 1 Smith, 356.

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tion. (a) However, in a subsequent case, (b) where a warrant of attorney had been given by the grantor and his surety, the Court allowed the representative of the surety, who was dead, to apply to set aside that warrant, because that gave the Court jurisdiction independent of the annuity act. This seems by no means satisfactory; the party applying was not affected by the judgment, for that survived against the grantor, who did not make any application, and there is nothing in the common law jurisdiction of the Courts which would have authorized them to interfere for a defect in the memorial, at the instigation of any one not a party to the judgment.

In the 6th section of the 53 Geo. III. c. 141, the person by whom the annuity or rent charge is made payable, *or whose property is liable to be charged or affected thereby*, may make application to the Court, which is an extension of the language of the old act. Therefore, if this section is to form an analogy for the interpretation of the 2d, as the 4th did to the 1st of the old act, undoubtedly all persons who become interested in the property charged may now apply summarily, as well as the grantor.

Application under the 17 Geo. III. c. 26, s. 4, and 53 Geo. III. c. 141, s. 6.

The provisions of the previous sections are precautionary and for the prevention of fraud, but those of the 4th of the 17 Geo. III. and the 6th of the 53 Geo. III. relate to the actual commission of fraud, and a summary power is given therein to the Courts on the part of the grantor alone by the former act, or of any person whose property is liable to be affected thereby by the latter, where a charge is made of any of the frauds mentioned in those sections. Thus, if any part of the consideration be retained by the grantee, or returned by the grantor, or when notes given in part satisfaction thereof are not paid, or are cancelled, a summary application may be made to the Court to stay any action which may have been commenced on the securities, and to have them cancelled, or to set aside or vacate any judgment that has been entered up in pursuance of the contract.

(a) *Garrod v. Saunders*, 6 T. R. 403.

(b) *Steadman v. Purchase*, ib. 737.

By these sections the summary jurisdiction which the Courts possessed over their own instruments has been extended to other securities, and, as we before observed, evidence in the ordinary course of proceedings inadmissible is now receivable by them in the investigation of these transactions.

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Unless a warrant of attorney has been given, a court of law cannot interfere to vacate any of the other securities until *an action has been commenced*, but where that instrument also accompanies the grant, the Court has immediate jurisdiction to interpose, though judgment be not signed, nor any action commenced, for such is the rule in other cases regarding such instruments, the Courts directing them to be cancelled to prevent any improper use being made of them. (a) And when the Courts do interpose in reference to one instrument, they have power under these sections to adjudicate upon all. The levying a fine in the Common Pleas where the proceedings are regular, will not give that court jurisdiction over the instruments of grant. At least, it was so held, where an objection was taken to the memorial, the Court saying, that it was not an action within the 4th section of the old act. (b)

When the
Court can inter-
fere.

It has been already observed, (c) that the jurisdiction given to the Court by these last sections is discretionary, and in their proceedings thereon they act according to equitable principles. They may refuse to interfere at all summarily, or they may impose such terms and conditions upon the parties as may seem just and reasonable. In regard to their interference, two rules have been laid down, which have guided the Courts in many of the cases brought before them, both on the former and the latter sections.

Their jurisdic-
tion is discre-
tionary.

The first rule is not to entertain a summary motion where the merits of the question have been already discussed by the same or another Court, between the same parties, and have been finally decided, though fresh objections be adduced. Provided the facts on which they arise were in the knowledge of the party at the time

First rule not to
interfere when
the merits of the
case has been
already dis-
cussed.

(a) *Exparte Chester*, 4 T. R. 694; *Thurkill v. Wallace*, cit. in note.

(b) *Craufurd v. Caines*, 2 H. Bl. 438.

(c) Page 158.

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of the first application. (a) This rule was founded upon the analogy of an action at common law, where after the merits of a question have been discussed, and a final judgment obtained, the parties are concluded, and cannot again canvass the same question in another action.

But the discussion of the merits here means with reference to this act. A suit between the same parties for an account, or upon some other collateral question, will not prevent the Court from afterwards hearing any objections raised on these statutes. (b)

Again: where a hostile suit has been instituted and carried on on the securities, and has proceeded to judgment, but the defendant has not availed himself of the objections against that suit, the Court will not interfere to stay the execution on an objection to the memorial. Thus where an action had been brought on the annuity bond, to which the defendant pleaded, and the plaintiff had judgment, the Court refused to set that judgment aside, on the ground of a defect in the memorial. (c) So where an elegit had been sued out on a judgment on a warrant of attorney, given to secure an annuity, and an ejectment had been brought on the inquisition, which was defended, the Court would not stay execution after a verdict in the ejectment, on an objection to the memorial then first alleged. (d)

But it is requisite in order to estop the grantor that there should have been a hostile suit which called upon him to raise the objection, if it were ever to be brought forward. Therefore, where judgment was entered up, and execution taken out and levied, and a fresh warrant of attorney given for the annuity and arrears, and judgment entered up thereon, and execution taken out again, the Court of King's Bench, nevertheless, heard the objections, and stayed the plaintiff's proceedings. (e)

(a) *Greathead v. Bromley*, 7 T. R. 465; *Schumann v. Weatherhead*, 1 East, 537.

(b) *Hart v. Lovelace*, 6 T. R. 471; *Ex parte Mackreth*, 2 East, 563.

(c) *Buck v. Tyte*, 1 T. R. 495.

(d) *Withy v. Woolley*, 7 T. R. 540.

(e) *Desenfans v. Obrijen*, 3 East, 559.

Again: where the judgment was revived by *scire facias*, and a *fieri facias* was sued out thereon, and on defendant's application time was given, after which a second *fieri facias* was issued, and the arrears then due were paid, the Court of Exchequer held the defendant was not prevented from applying to them, the writ of *scire facias* not being a hostile proceeding. (a)

Although the Court will not listen to the objection on a summary application when it might have been raised before, yet when it is attempted to enforce the securities the defendant may still urge it, if it be available in the proceedings then adopted. (b) Thus, though he may be prevented from setting aside the judgment on the warrant of attorney, yet he may plead the objection to an action on the bond.

The other rule is one of limitation of time. After a long period has elapsed, the Court will not interfere with a transaction where fraudulent or improper practices are charged; more especially if any of the parties thereto be dead, so that the explanation which he might have given is not obtainable. This agrees with the principles prevailing in equity, where the long lapse of time is considered as a tacit confirmation of a doubtful or fraudulent transaction. No actual limitation has been fixed, for every case depends upon its particular circumstances; but Lord Kenyon expressed an opinion that the Statute of Limitations might guide the judgment of the Courts. (c) In *Symmons v. Mortimer*, (d) he thought that the lapse of ten years, and the death of the agent, might be an answer to the grantor's application. So where the annuity had been paid for seven years, till the agent was dead, and then a charge was made that that agent had retained part of the consideration, the Court of King's Bench refused to relieve the grantor on this point. (e) Again: when it had been paid for eleven years, during seven of which the grantee, who was charged with a

Second rule as to limitation of time.

(a) *Fielde v. Cole*, Forrest, 125.

(b) *Bromley v. Holland*, 5 Ves. 617.

(e) *Poole v. Cabanes*, 8 T. R. 328.

(c) *Ex parte Maxwell*, 2 East, 86.

(d) 5 T. R. 139.

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retainer, had been dead, the Court dismissed the application. (a) And where that time had elapsed, the Court required that the affidavits in support of the grantor's rule should state that all the parties were still alive, thereby intimating that if any of them had been dead, it could not be supported. (b) Indeed, in one case, (c) though all the parties were alive, the Court of Common Pleas thought that they ought not to interfere after eleven years, yet there it turned out the objection was not available. But where scarcely six years had elapsed, and the party complained of was alive, and admitted the matter charged against him, the Court did not admit the limitation of time, which fell within the opinion expressed by Lord Kenyon, but gave relief. (d) And lately the Court of Common Pleas set aside an annuity where ten years had elapsed, after some consideration on this point, induced partly by the authority of *Gowland v. De Faria*, (e) in Chancery, where twenty-five years had expired. (f) And, again, after five years and the death of the grantee, where his testimony, indeed, could not have explained the illegality charged. (g)

Does not hold where the memorial is defective.

It will be observed, that by the lapse of time and the death of parties, the Courts are deprived of the means of obtaining correct evidence of transactions impeached before them, and therefore think it wrong to interfere. But in respect to the memorial, the objections seldom depend upon extrinsic evidence, and the lapse of time and death of parties will not prevent the Courts from forming a correct judgment upon that document. Again, the equitable principle of a confirmation does not apply, because the want of a legal memorial renders the annuity absolutely void, not voidable only as in the case of fraud; and it seems there can be no confirmation of a void instrument, as Lord Eldon has stated, with reference especially to this act. (h) Accord-

(a) *Ex parte Maxwell*, 2 East. 85. (c) *Meotham v. Howe*, 7 Taunt. 596.

(b) *Armstead v. Atkyns*, 2 Chit. 32. (d) *Williams v. Hockin*, 8 Taunt. 435.

(e) 17 Ves. 20.

(f) *Williamson v. Goold*, 1 Bing. 234; 8 Mo. 109.

(g) *Gorton v. Champneys*, 1 Bing. 287.

(h) *Bromley v. Holland*. Coop. 24.

ingly the lapse of time has been holden to be no answer where applications have been made by the grantor on objections to the memorial. (a)

But as it appears from the case of *E. P. Mackreth*, (b) the Court will make all reasonable intendment to support the instrument. And if the objection to the memorial be not clearly made out, the Court will not interfere after the lapse of time. As where there were erasures in the memorial which, if explained, might have removed the objection, the grantor's application, after the lapse of eighteen years, was dismissed. (c)

Again: when the grantor is alive and is able to make an affidavit, the Courts will not interfere, unless he joins in the application, and states his account of the transaction. Therefore, where the grantor had conveyed his property to trustees for the benefit of his creditors, the Court of Common Pleas refused to hear an application against the grantee, charging him with a retainer of the consideration, which was made on the part of the trustees without an affidavit from the grantor. (d)

There is nothing peculiar in the practice of the Courts in regard to the application of the grantor on these acts, except the following rule, which has existed in the King's Bench since 1802 (e) and in the Common Pleas since 1829. (f) "Where a rule to show cause is obtained for the purpose of setting aside an annuity or annuities, the several objections thereto, intended to be insisted upon by the counsel at the time of making such rule absolute, shall be stated in the said rule nisi."

When an objection is made to the memorial it is advisable, if not necessary, to produce a copy of the memorial as registered, properly authenticated at the time of moving the rule nisi, and to file the same with the affidavits.

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The grantor should make an affidavit, otherwise the court will not interfere.

Rules of K. B. and C. P. as to the form of applications.

(a) *Poole v. Cabanes*, 8 T. R. 329; *Van Braam v. Isaacs*, 1 B. & P. 461; *Drake v. Rogers*, 2 Br. & B. 19.

(b) 2 East. 563.

(c) *Const v. Phillips*, 4 D. & R. 344.

(d) *Dartnall v. M. of Wellesey*, 3 Br. & B. 255; 7 Mo. 63.

(e) T. T. 2 East, 569.

(f) M. T. 6 Bing. 347.

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The Courts impose terms when they do interfere.

But when the Courts do interfere on a summary application, it is customary to impose terms and conditions upon the grantor. It has been seen that this is done in the case where the memorial is defective; but there the principal is recoverable in an action by the grantee. Where there has been such a fraud as those provided for in the latter sections of the acts, it may not be quite certain that the grantee could recover his principal; it seems probable that he could not. Yet it is clearly equitable that the grantee ought to have what he has actually advanced, repaid to him, and the grantor is sufficiently relieved if the extortionate annuity is set aside. The Courts have accordingly adopted as general terms, that the principal and interest shall be repaid, on an account to be taken by the prothonotary or master. Thus in *Williamson v. Goold* (a) and *Gorton v. Champneys*, (b) which have been referred to above, (c) the annuity was set aside on the terms of the prothonotary taking an account of what was due for principal and interest, and the grantor's paying the balance so found. Again, in *Calton v. Porter*, (d) it was on payment of principal and interest. And in *Jones v. Silberschildt* (e) on equitable terms, deducting what was due for principal and interest, at five per cent. These were all cases in the Common Pleas. The Court of King's Bench set aside an annuity on the terms of the defendant's paying principal and interest, at five per cent., with such costs and brokerage as the master should think reasonable, and the costs of the application. (f) It does not appear from these reports whether the defendant is allowed to deduct the payments he has made, though that is perhaps inferable from the language of the Court in *Williamson v. Goold*, and there certainly seems no reason to distinguish this from the rule prevailing, where there is a defect in the memorial.

(a) 1 Bing. 234; 8 Mo. 109.

(b) 1 Bing. 287; 8 Mo. 302; and see *Mence v. Hammond*, 6 Mo. 495.

(c) Page 155.

(d) 2 Bing. 370.

(e) 4 Bing. 26; 12 Mo. 113.

(f) *Finley v. Gardner*, 6 B. & C. 165; 9 D. & R. 207.

Where an annuity was set aside on payment of the principal and interest, the Court of Common Pleas held, that the grantee should be reimbursed for the expenses of the conveyances, by which it had been secured. (a)

The Courts also exercise a discretion in awarding costs for or against the parties applying to them summarily. In one case, (b) where an annuity was set aside against the executor of the grantee for a defect in the memorial, the Court of Common Pleas would not oblige him to pay the costs, because he did not know the matter omitted in the memorial.

Where an annuity had been granted, but the securities being invalid through a defect in this act, it was abandoned, and a fresh agreement was entered into, for securing which the original securities were retained, the Court of Common Pleas refused to order them to be delivered up, there not being any intention to enforce them as annuity securities. (c)

The grantor is not confined to the courts of law for redress under these acts, he may also apply to a court of equity. There are, no doubt, cases where, if no warrant of attorney be given, the grantor cannot obtain the interference of a court of law; yet it may be very desirable for him to vacate the grant, which he alleges to be illegal, and in such cases he must resort to a court of equity. It has been long held, that a suit may be maintained in that court to set aside an annuity void through neglect of the annuity-acts, although the objection be valid at law, and the instruments are therefore void. The object of the suit is to have all these void securities cancelled and delivered up, and, where necessary, releases and reconveyances executed. This is done in the exercise of the court's general equitable relief, because, although void to all intents and purposes, yet if suffered to remain in the hands of the grantee, they might be used for purposes of vexation or injustice, or might pos-

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Expenses.

Costs

Delivery up of
the securities.

Relief in equity
on these acts.

(a) *Williamson v. Goold*, 1 Bing. 316; 3 Mo. 324.

(b) *Dickenson v. Boyne*, 1 B. & P. 335.

(c) *Goring v. Welles*, 1 B. & P. 395.

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Same rules prevail in equity as at law relative to this relief.

sibly operate as a cloud upon the grantor's title. (a) This relief, therefore, is given by a court of equity, acting under its general powers, and not under any authority given by the annuity acts.

There is the same rule with regard to the manner and time of taking the objection in equity as already mentioned in law. It is holden, that unless a defect in the memorial be stated in the pleadings or evidence, no advantage can be taken of it. (b) "The memorial," observed the Vice-Chancellor, "is not a constituent part of the grantee's title; but is matter collateral, for want of which in due form, the grant may be defeated, but that matter collateral must be shown. The Court must proceed on the pleadings and evidence in a cause, and upon these pleadings and proofs I am not authorized to question the title of the plaintiff to this annuity."

So also, it seems, from the opinion of the Master of the Rolls, in *Bromley v. Holland*, (c) that where summary applications have been made to other courts to vacate the annuity, and have been rejected, a court of equity will not entertain a motion on the same objections; but on different objections it will, even though they be legal. In *Angell v. Hadden*, (d) indeed, where the Court of King's Bench had discharged a summary application between the parties, a court of equity on a bill of interpleader filed against them both, vacated the annuity, though it seems, however, that the objections were different. Here, too, there had been a former suit between different parties, when there was a decree for payment of the annuity, and no attempt was made to invalidate the grant.

Lapse of time no answer to a defect in the memorial.

Again, although the long lapse of time may be oftentimes an answer to a charge of fraud in the transaction, yet it is no defence to an objection arising on the memorial. That

(a) *Byne v. Vivian*, 5 Ves. 604; *Bromley v. Holland*, ib. 610; 7 Ves. 3; *Underhill v. Horwood*, 10 Ves. 218; *Dupuis v. Edwards*, 18 Ves. 358.

(b) *Dunn v. Calcraft*, 2 S. & S. 62.

(c) 5 Ves. 610.

(d) 2 Mer. 164.

has long been settled by authority. Lord Erskine, indeed, in *Morse v. Royal*, (a) referred to Lord Kenyon's opinion in favour of the limitation of time, but he did not distinguish between the cases of fraud and defect in the memorial. Lapse of time leads to the presumption of acquiescence or confirmation, and a fraudulent or inadequate transaction may be rendered so far valid by confirmation as that the right of complaint may be taken away from the party who alleges the fraud. But it seems doubtful whether there can be any confirmation of instruments void for defect of the memorial. Lord Eldon said, in *Bromley v. Holland*, (b) that he could not see how a deed null and void was capable of confirmation. The facts of that case may be mentioned here. The plaintiff having granted an annuity to one Greathead, had applied twice to a court of law to set it aside, but failed. Greathead then sold it, and it came by assignment to the defendant. After the defendant had purchased it, the plaintiff executed an indenture empowering a trustee to receive the profits of the property charged, and pay them in discharge of the annuity. He then applied to a court of equity to set aside the original annuity deed, as being void under the act. The defendant contended, that even if it had been void, the plaintiff had confirmed it. But the Lord Chancellor held that, under the circumstances, there was no confirmation, for the grantor had no notice of the defects, and expressed the doubt above mentioned.

As confirmation is always a question of intention when the parties are acquainted with the defect in the transaction, it is evident that the proper course which the grantor ought to have pursued, if he really intended to confirm what was invalid, would have been to have re-executed the deeds, and to have had a proper memorial registered.

The statutes having declared the instruments to be void to all intents and purposes, and the policy of the acts requiring that they should not be set up, they are held to be

These deeds
cannot be re-
formed.

(a) 12 Ves. 378. See also *Low v. Barchard*, 8 Ves. 135.

(b) 7 Ves. Coop. 9.

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analogous with the ship registry acts, (a) and the Court of Chancery has no power to reform the deeds: it will not therefore, in the exercise of its equitable jurisdiction, do what has been done on the land registry acts, or on the more ancient statute regarding bargains and sales, where there has not been a valid inrolment. (b)

Although the objections resulting from these statutes be legal, yet the court will not necessarily require the opinion of a court of law. (c) If they be clearly manifest, judgment will be given at once; but where they are doubtful, the bill will be sustained until the parties have proceeded to take the opinion of the court of law in an action to be brought on any one of the securities upon which the questions may be raised most conveniently. Or a case may be sent expressly for the opinion of such court, as in other instances. (d)

Against whom
redress may be
sued.

The grantor may pursue his equitable redress wherever the securities may be; even though the annuity has been assigned, and he has been a party to the assignment, still he is not prevented from urging his objections against the assignee. (e)

This is not
considered as a
redemption.

The bill filed by the grantor on the ground of a defective memorial, is not considered as a redemption bill; for in truth the relief is not given upon the principle of a power of redemption reserved by the deed, but because the deed is void to all intents and purposes, and consequently there never was an annuity capable of being redeemed. Yet the usual terms of relief, that the plaintiff shall refund the consideration advanced to him, allowing interest thereon, and deducting all the payments which he has made, and if, on taking the account, there be any balance in favour of the grantee, that that shall be paid over to him. In *Byne v. Vivian*, (f) it was also directed that the grantee should repay

Terms of relief.

(a) *Cartis v. Perry*, 6 Ves. 746; *Mesther v. Gillespie*, 11 Ves. 639.

(b) *Davis v. Earl of Strathmore*, 6 Ves. 428.

(c) *Underhill v. Horwood*, 10 Ves. 220.

(d) *Ware v. Horwood*, 14 Ves. 28; *Abgell v. Madden*, 16 Ves. 262.

(e) *Bromley v. Holland*, cited above.

(f) 8 Ves. 664.

any surplus that might appear to have been overpaid. In *Byne v. Potter*, (a) however, where the defendant admitted he had been overpaid, no notice was taken of this surplus. This omission created some difficulty in the mind of Lord Eldon in *Bromley v. Holland*, and he seems ultimately not to have interfered with it. In that case the facts of which are sufficiently stated above, (b) with this addition, that the assignee had given less for the annuity than the original consideration, the Master of the Rolls had decreed that the sum originally advanced should be returned, and not the price of the assignment, and the grantor should only be allowed the payments made by him from the time of filing the bill. But on an appeal to the Lord Chancellor, the decree was reversed in this point, and the grantor was allowed to set off all the payments made by him, in this order, however, that they should be placed against the interest first, and then in reduction of the principal. The question as to the surplus in the hand of the grantee was debated at length in the case of *Holbrook v. Sharpey*, (c) and the Master of the Rolls determined that it must be repaid. He said he could not distinguish between the first and the last payments made by the grantor; either they were all voluntary, and none could be recovered back, or they were all money had and received to the grantor's use, and therefore were all to be accounted for or returned.

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The grantee
must repay the
surplus in his
hand.

But it cannot be taken that a return of the consideration will be awarded in every case where the securities are vacated for a defect of the memorial; for Lord Eldon has stated, (d) that it has been decided in that court that the grantor of an annuity void by the annuity act, may come there and have the annuity deed delivered up, without repaying the consideration money, though that is recoverable at law; but he cannot obtain relief without that condition, after he has, by his bill or answer, submitted to repay the consideration, as in *Dr. Battine's* case; the

Repayment of
the considera-
tion not always
awarded.

(a) 5 Ves. 609.

(b) Page 449.

(c) 19 Ves. 130. See 1 Taunt. 522.

(d) *Davis v. Duke of Marlborough*, 2 Swa. 134. 157.

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annuitant then is entitled to be repaid, not under his judgment, but under the grantor's submission. Dr. Battine's case there alluded to is reported in a note to 2 Swa. 156. n. (a.), by the name of Bazelgetti v. Battine. This opinion, however, of Lord Eldon has been examined at length in Mr. Maddock's Rep. vol. 5. p. 416, n., and that learned author certainly dissents from what his lordship has thus stated.

**Expenses of
insurance.**

With reference to what expenses may be allowed to the grantee, the court have refused the premiums of insurance paid by him on insuring the grantor's life, where the insurance at his expense was not expressly agreed for in the grant. (a)

But in another case, (b) where the grantor offered in his bill to pay the balance which might be due on the consideration, with interest and any other fair and reasonable demands. The Master of the Rolls held that the plaintiff was bound to allow to the grantee the premiums of insurance, he having stated on a previous occasion that he thought that fair and reasonable.

In Shaw ex parte, (c) certain expenses incurred by the grantee in applications to the Court of Chancery to obtain payment of the annuity, on previous occasions, were refused to him.

Costs.

On the subject of costs must be remembered what has been stated to be the nature of the relief, and that it is not redemption. In Byne v. Vivian (d) the grantor was ordered to pay the costs of the suit; while in Byne v. Potter (e) the grantee was decreed to pay them, but there he admitted he had been overpaid, and was not called upon to refund the surplus. In Bromley v. Holland (f) the Master of the Rolls directed that the grantor should pay all the costs of the suit, and this formed one of the grounds of appeal.

In this respect, also, the decree was reversed, for Lord

(a) Shaw, ex parte, 5 Ves. 521; Burdon v. Browning, 1 Taunt. 522; Williamson v. Goold, 8 Mo. 324.

(b) Hoffman v. Cooke, 5 Ves. 623.

(c) 5 Ves. 604. (d) 1b, 609. (e) 1b. 610. (f) 7 Ves. 2; Coop. 2.

Eldon refused the costs on either side, since it was not a case of redemption, where the defendant has his costs. In *Holbrook v. Sharpey*, (a) indeed, the grantor's executrix was decreed to pay the costs, but there she offered to take the same decree as in *Byne v. Vivian*, and attention was not drawn to this point. Where a party waits until the whole of the consideration has been repaid, and then applies to set aside the grant for a defect in the memorial, the court will not give him his costs. (b)

Such, then, are the civil remedies which the grantor may obtain in cases where he objects to the legality of the annuity. But the legislature has gone farther, and not only, as seen on a former occasion, it has prohibited the negotiating of annuities for infants, under the penalties of a misdemeanor, but also in order to prevent fraud and oppression upon distressed persons, as far as possible, it has endeavoured to restrain the excessive brokerage, by fixing a sum which the attorney or agent who negotiates the annuity shall receive, and has made the taking any excess over this sum a crime. The sum so limited is 10*s.* for every 100*l.*, that is, one-half per cent. The enactment is in the 17 Geo. III. c. 26. s. 7, and 53 Geo. III. c. 141. s. 9, as follows: "That all and every solicitors and solicitor, scriveners and scrivener, brokers and broker, and other persons or person who, from and after the passing of that act, shall ask, demand, accept, or receive, directly or indirectly, any sum or sums of money, or any other kind of gratuity or reward, for the soliciting or procuring the loan, and for the brokerage of any money that shall be actually and bonâ fide advanced and paid as and for the price or consideration of any such annuity or rent charge, over and above the sum of 10*s.* for every 100*l.* so actually and bonâ fide advanced and paid, shall be deemed and adjudged guilty of a misdemeanor, and being lawfully convicted of such offence in any court of assize, oyer and terminer, or general gaol delivery, shall and may, for every such offence, be punished by fine

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ANNUITY ACTS.

The taking excessive brokerage is made a misdemeanor, 17 Geo. III. c. 26. s. 7. 53 Geo. III. c. 141. s. 9.

(a) 19 Ves. 130.

(b) *Duff v. Atkinson*, 8 Ves. 584.

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and imprisonment, or one of them, at the discretion of the Court, and that the person or persons who shall have paid or given any sum or sums of money, gratuity or reward, shall be deemed a competent witness or witnesses to prove the same."

It may be doubted whether this enactment has had or is likely to have much real effect. Annuity transactions are generally secret and clandestine, few witnesses are present, indeed seldom more than the parties and their agents. Although to relieve himself from the pecuniary obligation the grantor may be willing to disclose an affair in which he has participated, yet it is hardly to be expected that he will do that merely for the object of public justice, and to bring a man to punishment for an act which has been a temporary benefit to himself. And if the grantor be the only witness, a jury would not be altogether satisfied to convict an individual upon such testimony unconfirmed.

However, one case has occurred where this section was acted upon, and an indictment was preferred, upon which the defendant was convicted, though, as Mr. Withy observes, it does not appear that he was brought up for judgment. It was the case of one Gilham, and was tried before Lord Kenyon, at Westminster in 1795, and a point arose that ought to be mentioned. (a) The indictment charged the defendant with demanding and receiving 322*l.* 10*s.* for the brokerage of the sum of 2450*l.* which exceeded the sum of 10*s.* for every 100*l.* advanced. It was proved that the defendant said that 100*l.* was for the writings (he being an attorney and having prepared them), 100*l.* by way of present, and 5*l.* per cent. on the whole sum, namely, 122*l.* 10*s.* It was objected that this was a variance, but Lord Kenyon overruled the objection, thinking it immaterial, but left it to the jury to consider whether the whole transaction were not a mere colour and device to receive the sum stated under different pretences, but in truth for the brokerage and soliciting of the loan in fraud of the act of parliament. The

(a) *King v. Gilham*, 6 T. R. 265; 1 Esp. C. 227.

defendant was convicted, and, on a motion for a new trial, the Court of King's Bench confirmed this decision, and it was held that the question was, whether the defendant really took more than 10s. in the 100l. by way of brokerage, for if he colourably took a large sum more, under pretence that the excess above 10s. was for another purpose that would not avail him; and it was not necessary to prove the exact sum laid in the indictment.

It will be remembered that the last sections of these acts restrain their operation, and except certain cases where they shall not apply, no doubt those exceptions would extend to these sections. In some cases this is not desirable; there is as much reason for the prohibition of excessive brokerage, where the annuity is secured on freehold property, or on stock in the funds, as where the security is merely personal.

CHAP. XI.
OF EVIDENCE.

CHAPTER XI.

OF EVIDENCE.

Some few observations on evidence.

IN this, the concluding chapter, it remains to bring before the reader a few notes upon evidence, which have occurred relative to the subjects of this treatise. They are necessarily detached, because it is impossible to form any connection on so wide and discursive a subject. Whatever may be the issue, there will seldom, if ever, be any thing peculiar in the evidence resulting from the nature of these contracts.

Parol evidence not admissible to introduce a power of redemption.

The rule of law that parol evidence shall not be allowed to alter deeds, or written instruments, has been exemplified by several cases of annuity transactions. It has been already observed, that to avoid the statutes of usury it was customary to make the grant absolute on the face of the deed, but with a parol agreement that the grantor should have power to redeem. It was determined in the Court of Chancery that evidence of this parol agreement could not be received, as its effect would be to contradict the deed.^(a) If, indeed, any fraud was imputed, then the case would be different, but that could not be where the omission of the agreement was by the mutual consent of the parties.

In *Hare v. Shearwood*,^(b) a bill was filed against executors to redeem an annuity granted to the testator, with a parol agreement for redemption. The defendants stated that they knew nothing about the agreement, but were willing to do what the Court should think fit. It was urged, that as they did not deny the agreement the Court would enforce it. But Buller, J., sitting for the Lord

(a) *Lord Irnham v. Child*, 1 B. C. C. 92; *Lord Portmore v. Morris*, 2 B. C. C. 219.

(b) 3 B. C. C. 168; 1 Ves. J. 241.

Chancellor, refused to admit the parol evidence, and dismissed the bill.

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The security which had been given here was a bond conditioned for the payment of the annuity absolutely, and a warrant of attorney to enter up judgment upon that bond. An application was therefore made to the Court of Common Pleas to allow the party to redeem, on the ground of the equitable control which they exercise over such instruments. But the Court considering that the grantee was dead, and the witness was his attorney, held that they could not interfere to add a term not in the bond upon parol testimony. If the grantee had been alive, and had admitted the agreement, they would have allowed it; if he had denied it, they might have refused to move at all, or probably might have given credit to the affidavit of his attorney against him. (a)

But where a grantor brought a bill to vacate the annuity, and offered to repay what was fair and reasonable, the grantee claimed to have the premiums of insurance allowed, and to show that this was reasonable desired to read a letter from the grantor previous to the granting of the annuity, wherein he had proposed in another annuity to allow the insurance. The Master of the Rolls received it, not to alter the deed, or to vary the agreement between the parties, but to show what he thought to be reasonable terms. (b)

Again: where the same annuity was given twice, once by will and afterwards by settlement, parol evidence was admitted, not to prove the intent of either instrument, but the reason of making two. (c)

Parol evidence has also been admitted to prove a consideration beyond that stated in the deed of grant. As where the annuity was expressed in the deed to have been granted for natural love and affection, it was held competent for the grantee to prove by extrinsic evidence that it was

Admitted to prove a consideration beyond that stated in the grant.

(a) Haynes v. Hare, 1 H. Bl. 659. (b) Hoffman v. Cook, 5 Ves. 623.

(c) Mascal v. Mascal, 1 Ves. S. 323. But see Finney v. Finney, 1 Wils. 34.

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Where fraud
intervenes parol
evidence may
be admitted.

in consideration of marriage.(a) The case of *Clarkson v. Hanway*,(b) seems not quite consistent with this; there the consideration in the deed of conveyance was an inadequate annuity, and the Court refused to allow the defendant to superadd the consideration of relationship and kindred.

It was noticed above that fraud would form an exception to the rule which excludes this parol evidence. Hence, where the grant of the annuity stated the amount to be 150*l.* per annum, parol evidence was received by the Master of the Rolls, Sir J. Strange, that the parties had expressly agreed, that though it should represent 150*l.*, the sum of 100*l.* only should be paid.(c) This stands upon the ground of fraud.

These cases have occurred in annuity transactions with reference to this branch of the law of evidence.

Competency of
witnesses.

With regard to the competency of witnesses, it will be remembered that the effect of the annuity acts has been to allow the testimony of persons in courts of law on summary applications who would otherwise have been incompetent, namely, the parties themselves, who could never have given evidence except where the courts allowed a summary application to be made, which was in a very few cases compared with those authorized by those acts. The sections which make the taking of excessive brokerage a misdemeanor direct that the party paying the extra sum shall be a competent witness. This seems to be an excess of caution, for it is difficult to see why he should have been incompetent; he does not appear to gain any thing from the indictment.

In a case in equity, where two persons had each a rent charge by the same deed on the same estate, it was decided that one could not be a competent witness for the other in a suit relating thereto, unless he would release his own rent charge.(d)

Where an action was brought against an attorney for negligence in negotiating an annuity, the Court of King's

(a) *Tanper v. Byne*, 2 Sim. 160.

(b) 2 P. W. 203.

(c) *Pitcairne v. Ogbourne*, 2 Ves. 8, 376.

(d) *Lord Culpeper v. Fairfax*, 2 Vern. 375.

Bench decided that the supposed grantor was a competent witness for the plaintiff to prove that the deed was a forgery, because the judgment in that action would be no evidence for the witness in an action brought against him by the grantee on the deed. (a)

CHAP. XL
OF EVIDENCE.

It may often be difficult for the grantee to produce the title deeds under which he claims, either because they are lost, or are in the possession of adverse parties. Besides the ordinary resources in similar emergencies it may be stated, that in a case of an avowry for a rent charge, (b) where the avowant could not produce the will under which he claimed, as it belonged to the devisee of the land, it was decided by Lord Holt to be sufficient against the devisee of the land charged, to produce the ordinary's register of the will and prove former payments. It would certainly in such a case be prudent, if not necessary, to give notice to the devisee of the land, if the action were against him, to produce the will, supposing he had it, which can seldom be, except where there are exempt jurisdictions.

Grantee's power
of producing the
title deeds.

Where the grantee proceeds to enforce his grant, and avail himself of the annuity deed, it is not incumbent upon him to prove that it has been duly inrolled. The grantor, or the party entitled to raise the objection, must show that it requires inrolment, and that either no memorial has been inrolled, or else one that is invalid. (c)

The grantee
need not prove
inrolment of the
memorial.

(a) *Hunter v. King*, 4 B. & A. 209.

(b) *Anon.* 12 Mod. 375 ; B. N. P. 246.

(c) *Doe v. Mason*, 3 Campb. 7 ; *Doe v. Bingham*, 4 B. & A. 672.

APPENDIX.

17 GEO. III. c. 26.

An Act for registering the Grants of Life Annuities and for the better Protection of Infants against such Grants.

WHEREAS the pernicious practice of raising money by the sale of Life Annuities hath of late years greatly increased, and is much promoted by the secrecy with which such transactions are conducted; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, shall within twenty days of the execution of such deed, bond, instrument or other assurance, be inrolled in the high Court of Chancery, and that every such memorial shall contain the day of the month and the year when the deed, bond, instrument or other assurance bears date, and the name of all the parties, and for whom any of them are trustees, and of all the witnesses; and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations of granting the same; otherwise every such deed, bond, instrument or other assurance shall be null and void to all intents and purposes.

Preamble.

Memorial of all deeds, &c. for granting life annuities shall be inrolled in Chancery, &c.

II. And be it further enacted, That before any judgment shall be entered of record upon any warrant of attorney for recovering or securing the payment of any annuity or rent charge that hath already been granted for one or more life or lives, or for any term of years or greater estate determinable upon one or more life or lives, and before any execution shall be sued out or action brought on any such judgment already entered, or on any deed, bond, instrument or other assurance already executed for the purposes aforesaid, a like memorial of the deed, bond, instrument or other assurance shall be inrolled in the High Court of

Before judgment be entered upon any warrant of attorney a memorial shall be inrolled.

Chancery; and in case the party shall neglect to inrol the same, any such judgment, execution or proceeding in the action respectively shall be null and void.

All future deeds shall contain the consideration and names at length.

III. And be it further enacted by the authority aforesaid, That in every deed, instrument or other assurance, whereby any annuity or rent charge shall, from and after the passing of this act, be granted or attempted to be granted, the consideration really and bonâ fide (which shall be in money only) and also the name or names of the person or persons by whom, and on whose behalf, the said consideration, or any part thereof, shall be advanced, shall be fully and truly set forth and described in words at length; and in case the same shall not be fully and truly set forth and described, every such deed, instrument or other assurance shall be null and void to all intents and purposes.

If part of consideration be returned, or any notes shall not be paid when due, &c.

IV. And be it further enacted, That if any part of the consideration shall be returned to the person advancing the same, or in case the consideration, or any part of it, is paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; or if the consideration, or any part of it, is paid in goods; or if any part of the consideration is retained on pretence of answering the future payments of the annuity, or any other pretence, in all and every of the aforesaid cases it shall and may be lawful for the person, by whom the annuity or rent charge is made payable, to apply to the court in which any action is brought for payment of the annuity on judgment entered by motion, to stay proceedings on the judgment or action, and if it shall appear to the court that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the court to order the deed, bond, instrument, or other assurance, to be cancelled, and the judgment, if any has been entered, to be vacated.

The court may order the deed to be cancelled, &c.

Directions relating to inrolment of memorials.

V. And be it further enacted, That a particular roll shall be provided and kept by the clerks of the inrolments in Chancery, or their deputy, on which such memorial shall be entered, and that every such memorial shall be duly intolled in order of time as the same shall be brought to the office; and the said clerks of the inrolments, or their deputy, shall specify upon the roll the certain day, hour, and time, on which such memorial is brought to the office, and shall grant a certificate of the inrolment thereof when required, and that there shall be paid for the

inrolment of every such memorial the sum of one shilling, and no more, in case the same do not exceed two hundred words; but if such memorial shall exceed two hundred words, then after the rate and proportion of sixpence for every one hundred words, and the like fees for every certificate and copy given; and the fee of one shilling for every search in the office, and no more.

The Clerks' Fees.

VI. And be it further enacted, by the authority aforesaid, That all contracts for the purchase of any annuity with any person, being under the age of twenty-one years, shall be and remain utterly void, any attempt to confirm the same, after such person shall have attained the age of twenty-one years, notwithstanding; and that if any person shall, either in person, by letter, agent, or otherwise howsoever, procure, engage, solicit, or ask any person, being under the age of twenty-one years, to grant, or attempt to grant any annuity or rent charge, or to execute any bond, deed, or other instrument for securing the same; or shall advance, or procure, or treat for any money to be advanced to any person, under the age of twenty-one years, upon consideration of any annuity or rent charge to be secured or granted by such infant after he or she shall have attained his or her age of twenty-one years; or shall induce, solicit, or procure any infant upon any treaty or transaction for money advanced, or to be advanced, to make oath, or to give his or her word of honour, or solemn promise, that he or she will not plead infancy, or make any other defence against the demand of any such annuity or rent charge, or the repayment of the money advanced to him or her, when under age, or that when he or she comes of age, he or she will confirm, or ratify, or in any way substantiate such annuity or rent charge; every such person shall be guilty of a misdemeanor, and being thereof lawfully convicted in any court of assize, oyer and terminer, or general gaol delivery, shall and may be punished for the said offence by fine, imprisonment, or other corporal punishment, as the court shall think fit to award.

All contracts for purchase of annuities with any person under twenty-one years of age to be void. Any person who shall procure or solicit any minor to grant an annuity, &c.

shall be punished by fine and imprisonment, &c.

VII. And be it enacted by the authority aforesaid, That all and every solicitors and solicitor, scriveners and scrivener, brokers and broker, and other persons or person who from and after the passing of this act shall ask, demand, accept, or receive, directly or indirectly, any sum or sums of money, or any other kind of gratuity or reward, for the soliciting or procuring the loan, and for the brokerage of any money that shall be actu-

Solicitors, scriveners, &c. who take more than 10s. per £100 for procuring money for annuities, shall be punished by fine and imprisonment, &c.

ally and bonâ fide advanced and paid as and for the price or consideration of any such annuity or rent charge, over and above the sum of ten shillings for every one hundred pounds so actually and bonâ fide advanced and paid, shall be deemed and adjudged guilty of a misdemeanor, and being lawfully convicted of such offence in any court of assize, oyer and terminer, or general gaol delivery, shall and may for every such offence be punished by fine and imprisonment, or one of them, at the discretion of the court, and that the person or persons who shall have paid or given any sum or sums of money, gratuity or reward, shall be deemed a competent witness or witnesses to prove the same.

Certain cases to which the Act shall not extend.

VIII. And be it further enacted, That nothing in this Act contained shall extend to any annuity or rent charge given by will or by marriage settlement, or for the advancement of a child; nor to any annuity or rent charge secured upon lands of equal or greater annual value, whereof the grantor was seized in fee-simple or in fee-tail, in possession at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity granted without regard to pecuniary consideration; nor to any annuity or rent charge granted by any body corporate, or under any authority or trust created by act of parliament; nor to any annuity where the sum to be paid does not exceed ten pounds annually, unless there be more than one such last-mentioned annuity from the same grantor or grantors to, or in trust for, the same person or persons.

53 GEO. III. c. 141.

An Act to Repeal an Act of the 17th year of the reign of his present Majesty, intituled an "Act for Registering the Grants of Life Annuities, and for the better protection of Infants against such Grants," and to substitute other Provisions in lieu thereof.

[14th July, 1813.]

WHEREAS it is expedient that an Act passed in the seventeenth year of his present majesty, intituled "An Act for Registering the Grants of Life Annuities, and for the better Protection of Infants against such Grants," should be repealed, and other provisions substituted in lieu thereof: may it therefore please your majesty that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, That the said recited Act shall be, and the same is hereby repealed, save and except so far as regards any annuities or rent charges which have been granted before the passing of this Act.

II. And be it further enacted, That within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of this Act, be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be inrolled in the High Court of Chancery in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require,

17 Geo. III. c. 26, repealed, except as to annuities or rent charges.

Annuities, &c. inrolled in Chancery.

Date of Instrument.	Nature of Instrument.	Names of Parties.	Names of Witnesses.	Name or Names of Person or Persons by whom Annuity or Rent Charge to be beneficially received.	Person or Persons for whose Life or Lives the Annuity or Rent Charge is granted.	Consideration, and how paid.	Amount of Annuity or Rent Charge.
10th August, 1813.	Indentures of Lease and Release	A. B. of one part C. D. of the other part	E. F. of — G. H. of —	C. D.	A. B.	£100 paid in money, £500 paid in notes of the Governor and Company of the Bank of England, or other Notes or Bills of Exchange, as the case may be.	£100 a year.
Same date.	Bond in penalty of £1200	A. B. to C. D.	E. F. G. H.	For securing the same Annuity or Rent Charge.			
Same day.	Warrant of attachment to confess judgment on behalf of King's Bench.	A. B. to J. K. & L. M. attorneys of Court of King's Bench.	E. F. G. H.				

otherwise every such deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes.

III. Provided always, and be it further enacted, That if any such annuity shall be granted by, or to or for the benefit of any company exceeding in number ten persons, which company shall be formed for the purpose of granting or purchasing annuities, it shall be sufficient in any such memorial to describe such company by the usual firm or name of trade.

Companies described by their usual firm.

IV. And be it further enacted, That in every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of this Act, be granted, or attempted to be granted, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, where the person or persons to whom such annuity shall be granted or secured to be paid shall not be entitled thereto beneficially, the name or names of the person or persons who is or are intended to take the annuity beneficially shall be described in such, or the like manner, as is hereinbefore required in the inrolment; otherwise every such deed, instrument, or other assurance, shall be null and void.

Names of parties beneficially interested stated.

V. And be it further enacted, That in case any person or persons by whom any annuity or rent charge, of which such particulars as aforesaid are hereby required to be inrolled, shall, for the time being, be payable, shall be desirous of obtaining a copy of every or any deed, bond, instrument, or other assurance, whereby such annuity or rent charge was granted, and of such his, her, or their desire, shall give twenty-one days' notice in writing to the person or persons for the time being entitled to such annuity or rent charge, such person or persons shall, on or before the expiration of such twenty-one days, unless prevented by fire or other inevitable accident, and in that case, if the assurances shall not be destroyed by such accident, then as soon after as such impediment shall be removed, send or deliver to the person or persons requiring the same a copy of every deed, bond, instrument, or other assurance, whereby such annuity or rent charge was granted, or of such of the assurances as in such notice shall be required, and such last-mentioned person or persons shall, at the time of receiving the same, pay to the person or persons furnishing the same a sum after the rate of sixpence for every one hundred words contained in every such copy, and also the reasonable costs of sending or delivering the same, and the person or per-

Copies of deeds or instruments securing annuities may be obtained.

sons holding the original instruments, by which such annuity or rent charge shall be secured, shall suffer the person or persons, to whom such copies shall be delivered or sent, to examine the same with the originals, and in case such copies shall not be sent or delivered, or the person or persons holding the original instruments shall refuse to suffer such copies to be examined therewith according to the direction in this Act, it shall be lawful for the person or persons, by whom the annuity or rent charge is payable, to take out a summons from any of his majesty's justices of his courts of King's Bench and Common Pleas, requiring the person or persons neglecting to send or deliver such copies, or refusing to suffer the same to be examined with the original instrument as aforesaid, to appear before such judge, and show cause in the premises; and it shall and may be lawful for the judge, before whom such person or persons shall be summoned, to make such order for the production of the instruments by which such annuity or rent charge shall be secured, and for suffering the complainant to take copies thereof, and examine the same, or the copies delivered with the original instruments, and otherwise in the premises as to such judge shall seem meet.

In what cases
proceedings
against grantor
of annuity
stayed.

VI. And be it further enacted, That if any part of the consideration for the purchase of any such annuity or rent charge shall be returned to the person advancing the same, or in case such consideration, or any part of it, shall be paid in notes, if any of the notes, with the privy and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid, or if such consideration is expressed to be paid in money, but the same, or any part of it, shall be paid in goods; or if the consideration, or any part of it, shall be retained on pretence of answering the future payments of the annuity or rent charge, or any other pretence; in all and every the aforesaid cases it shall be lawful for the person by whom the annuity or rent charge is made payable, or whose property is liable to be charged or affected thereby, to apply to the court in which any action shall be brought for payment of the annuity or rent charge, or judgment entered, by motion to stay proceedings on the action or judgment, and if it shall appear to the court that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the court to order every deed, bond, instrument, or other assurance, whereby the annuity or rent charge is secured,

to be cancelled, and the judgment, if any has been entered, to be vacated.

VII. And be it further enacted, That a particular book shall be provided and kept by the clerks of the inrolments in Chancery, or their deputy, in which such particulars as hereinbefore are mentioned shall be entered alphabetically by the names of the grantors in order of time as the same shall be brought to the office, and the said clerks of the inrolments, or their deputy, shall specify in the book the certain day, hour, and time, on which such particulars are brought to the office, and shall grant a certificate of the entry thereof when required; and that there shall be paid for every such entry twenty shillings only, and the fee of one shilling for every certificate and copy given, and the fee of one shilling for every search in the office, and no more.

Book to be kept by clerks of inrolments in Chancery.

Fees.

VIII. And be it further enacted, That all contracts for the purchase of any annuity or rent charge with any person, being under the age of twenty-one years, shall be and remain utterly void, any attempt to confirm the same, after such person shall have attained the age of twenty-one years, notwithstanding; and that if any person shall either in person, by letter, agent, or otherwise howsoever, procure, engage, solicit, or ask any person, being under the age of twenty-one years, to grant or attempt to grant any annuity or rent charge, or to execute any bond, deed, or other instrument for securing the same, or shall advance, or procure, or treat for any money to be advanced to any person under the age of twenty-one years, upon consideration of any annuity or rent charge to be secured or granted by such infant after he or she shall have attained his or her age of twenty-one years, or shall induce, solicit, or procure any infant, upon any treaty or transaction for money advanced or to be advanced, to make oath, or to give his or her word of honour or solemn promise that he or she will not plead infancy, or make any other defence against the demand of any such annuity or rent charge, or the repayment of the money advanced to him or her when under age, or that when he or she comes of age, he or she will confirm or ratify, or in any way substantiate such annuity or rent charge, every such person shall be guilty of a misdemeanor, and being thereof lawfully convicted in any court of assize, oyer and terminer, or general gaol delivery, shall and may be punished for the said offence by fine, imprisonment, or other corporal punishment, as the court shall think fit to award.

Contracts for purchase of annuities by persons under age void.

Endeavouring to induce infants to grant annuities.

Misdemeanor.

Acting as solicitors, &c. in such cases.

Misdemeanor.

Witnesses.

Proviso for Scotland or Ireland, and annuities granted by will, &c.

IX. And be it further enacted, That all and every solicitors and solicitor, scriveners and scrivener, brokers and broker, and other persons or person who, from and after the passing of this Act, shall ask, demand, accept, or receive, directly or indirectly, any sum or sums of money, or any other kind of gratuity or reward, for the soliciting or procuring the loan, and for the brokerage of any money that shall be actually and bonâ fide advanced and paid as and for the price or consideration of any such annuity or rent charge over and above the sum of ten shillings for every one hundred pounds so actually and bonâ fide advanced and paid, shall be deemed and adjudged guilty of a misdemeanor, and being lawfully convicted of such offence in any court of assize, oyer and terminer, or general gaol delivery, shall and may for every such offence be punished by fine and imprisonment, or one of them, at the discretion of the court, and that the person or persons who shall have paid or given any sum or sums of money, gratuity or reward, shall be deemed a competent witness or witnesses to prove the same.

X. And be it further enacted, That this Act shall not extend to Scotland or Ireland; nor to any annuity or rent charge given by will, or by marriage settlement, or for the advancement of a child; nor to any annuity or rent charge secured upon freehold or copyhold or customary lands in Great Britain or Ireland, or in any of his majesty's possessions beyond the seas, of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant, whereof the grantor is seized in fee-simple or fee-tail in possession, or the fee-simple whereof in possession the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent charge granted without regard to pecuniary consideration or money's worth; nor to any annuity or rent charge granted by any body corporate, or under any authority or trust created by act of parliament.

3 GEO. IV. c. 92.

An Act to explain an Act of the 53d year of the reign of his late Majesty respecting the Inrolment of Memorials of Grants of Annuities.

[29th July, 1822.]

WHEREAS by an Act of Parliament made and passed in the fifty-third year of the reign of his late Majesty King George the Third, intituled "An Act to repeal an Act of the seventeenth year of the reign of his present Majesty, intituled an Act for registering the Grants of Life Annuities, and for the better Protection of Infants against such Grants, and to substitute other Provisions in lieu thereof," it is enacted, "That within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall from and after the passing of the said act be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument or other assurance, of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be granted, and of the person or persons by whom the same is to be beneficially received, shall be inrolled in the High Court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require: And whereas the form or effect to which such enactment refers is expressed in several columns, at the head of one of which are the words "Names of witnesses," and underneath, as applicable to indentures of lease and release, the letters and words "E. F. of," "G. H. of," and as applicable to a bond and warrant of attorney to confess judgment, the letters "E. F.," "G. H.," without the word "of:" And whereas the words of enactment referring to such form express only that a memorial of the names of all the witnesses to every such deed, bond, instrument, or other assurance, as therein mentioned, should be inrolled as directed by the said act, without providing that any description

53 Geo. III.
c. 141, s. 11.

of the witnesses should be given in such memorial, except as such form is thereby referred to; and such form does not provide that any description should be added to such names except by the addition of the word "of" to the letters "E. F." and "G. H." as aforesaid, as applicable to indentures of lease and release: And whereas in consequence of such indistinct enactment it may be doubtful whether it was the intention of the legislature to require any, or if any, what description to be added to the names of witnesses in the memorial of any deed, instrument, or assurance to be inrolled as aforesaid: And whereas a very great number of memorials of grants of annuities have since the passing of the said act been inrolled, in which the names of the witnesses to the deeds, instruments, or assurances specified in such memorials, have been inserted without the addition of the place of abode of such witnesses; and it has been inferred, from the use of the word "of" after such letters "F. F." and after such letters "G. H." as aforesaid, that it was necessary to describe each of such witnesses in such memorial as of some place, and in consequence thereof some grants of annuities made since the passing of the said act have been, in proceedings in summary applications to courts of justice, which cannot be reviewed in any superior court, deemed null and void, on the ground that no description of the place of abode of the witnesses to some or one of the deeds, instruments, or assurances by which such grants of annuities have been made, had been inserted in the memorials or memorial thereof, inrolled as directed by the said act: And whereas doubts have been entertained whether the construction so put on the said act is the true construction thereof, more especially as the same is so far penal as it renders deeds, instruments, and assurances, of which memorials have not been inrolled in pursuance of the said act, null and void, and the provisions in the said act are not so clear and explicit as the same ought to have been under such circumstances, and the parties claiming under grants of annuities may have been thereby misled and induced to conceive that it was not necessary under the provisions of the said act to insert in the memorial of any deed, instrument, or assurance, to be inrolled as aforesaid, the place or places of abode of the witness or witnesses to such deed, instrument, or assurance, or any more than the name or names of such witness or witnesses, there being no words in the said act expressly requiring any

more to be so inserted, nor any words from which it could be inferred that any more was required to be so inserted except the word "of" after the letters "E. F." and "G. H." respectively, with reference to one species of assurance, inserted in the form of memorial before mentioned; and it is expedient to remove all doubts touching the construction of the said act, with respect to so much of the memorials required by the said act to be inrolled, as relates to any description of the witness or witnesses to any deed, instrument, or assurance: May it therefore please your Majesty that it may be enacted and declared, and be it enacted and declared by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That by the said act of the fifty-third year of the reign of his said late Majesty, no further or other description of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent charge is or may be granted, is required in the memorial thereof besides the names of all such witnesses, and so the said act shall be deemed, construed, and taken.

The names of witnesses only necessary in memorial of annuities.

II. And whereas doubts have also arisen whether, under the said act of the fifty-third year of the reign of his said late Majesty, the omission to inrol a memorial of any one of the assurances for securing any annuity or rent charge does not vitiate the whole transaction, notwithstanding the inrolment of a memorial of another deed, bond, instrument, or other assurance granting the same; and it is also expedient to remove such doubts, be it therefore further enacted and declared, That every deed, bond, instrument, or other assurance, granting any annuity or rent charge, and of which a memorial shall have been or shall be duly inrolled pursuant to the said act, notwithstanding the omission to inrol any other deed, bond, instrument, or assurance for securing such annuity or rent charge, shall be valid and effectual, according to the intent, meaning, and true effect thereof, notwithstanding a memorial of any other deed, bond, instrument, or assurance for securing the same annuity shall not have been duly inrolled, pursuant to the said act.

Annuity deed, a memorial of which has been inrolled, valid notwithstanding omission of inrolling any other deed for securing such annuity.

III. Provided always, and be it further enacted, That nothing herein contained shall extend to give any other force or validity to any deed, bond, instrument, or other assurance, of which a

Act not to give any additional validity to any deed.

memorial shall have been duly inrolled as aforesaid, than such deed, bond, instrument, or other assurance would have had if any deed, bond, instrument, or other assurance for securing the same annuity, of which a memorial shall not have been duly inrolled, had never been executed.

Act not to give effect to any deed declared void, or affect any proceedings at law commenced as herein-mentioned.

IV. Provided always, and be it further enacted, That this act shall not extend, or be construed to extend, to revive or give effect to any deed, bond, instrument, or other assurance, whereby any annuity or rent charge hath been already granted, so far as the same hath been adjudged, declared, treated, or deemed void by any judgment, decree, action, suit, or proceeding at law or in equity, or by any acts or deeds of the parties thereto, or by any other legal or equitable means whatsoever; nor shall this act *affect or prejudice* any suit or *proceeding* at law or in equity *commenced on or before* the thirty-first day of May, one thousand eight hundred and twenty-two, and now depending, upon the ground of an alleged defect in the memorial thereof, in not describing the witnesses thereto otherwise than by his, her, or their name or names, for avoiding any such deed, bond, instrument, or other assurance.

7 GEO. IV. c. 75.

An Act to explain an Act of the Fifty-third year of the reign of his late Majesty respecting the Inrolment of Memorials of Grants of Annuities.

[31st May, 1826.]

WHEREAS by an Act of Parliament made and passed in the fifty-third year of the reign of his late Majesty King George the Third, intitled "An Act to repeal an Act of the seventeenth year of the reign of his present Majesty, intitled An Act for registering the Grants of Life Annuities, and for the better Protection of Infants against such Grants, and to substitute other Provisions in lieu thereof;" it is enacted, That within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall from and after the passing of the said act be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be granted, and of the person or persons by whom the same is to be beneficially received, shall be inrolled in the High Court of Chancery, in the form or to the effect in the said act stated, with such alterations therein as the nature and circumstances of any particular case may reasonably require: And whereas it frequently happens that the names of witnesses to grants of annuities or other assurances are unknown to the grantees thereof, or their solicitors or agents, otherwise than as they appear by the subscriptions of such witnesses to the attestations of the execution of such grants or assurances, and it might greatly endanger the validity of any such assurance if any name were inserted in the memorial thereof as the name of any such witness in any other manner than as the same appears signed by such witness as attesting the execution of such assurance: And whereas a very great number of memorials of grants of annuities have since the passing of the said act been inrolled,

53 Geo. III.
c. 141, s. 11.

in which the surnames of witnesses to the deeds, instruments, or assurances, specified in such memorials, have been inserted, together with such initial letter, or abbreviation of the Christian names of such witnesses as appeared subscribed to the attestation by such witnesses of the execution of such deeds, instruments, or assurances, without stating at full length the Christian names of such witnesses : And whereas doubts have been entertained whether, according to the true construction of the said act, it is necessary to the validity of any such grant, or other assurance, that the Christian as well as surnames of all the witnesses to such deed, grant, or other assurance, should be inserted in the memorial thereof in any other manner than as the same may appear subscribed to the attestation of such deed, grant, or other assurance, by such witness respectively ; and in order to remove such doubts, be it enacted and declared by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That by the said act of the fifty-third year of the reign of his said late Majesty no further or other name or names of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent charge is or may be granted, is or are required in the memorial thereof besides the names of all such witnesses as they shall appear signed to the attestations respectively of the execution of such deed, bond, instrument, or other assurance ; and so the said act shall be deemed, construed, and taken.

No further or other names of witnesses required in memorial than appear in the deed.

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